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CASES

ON

TORTS

WITH ABSTRACTS OF LECTURES UPON SEVERAL TORTS

By

CHARLES A. KEIGWIN

Melius est petere fontes quam sectari rivulos

BALTIMORE:
HEPBRON AND HAYDON
1915

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PREFACE.

This collection of cases dealing with the elementary principles of torts is due to the need of such a work experienced by the compiler in his instruction upon that subject. The purpose is to acquaint the student with the authorities which establish the fundamental propositions of his text-book, rather than to develop the doctrines so established in their more particular applications. The cases selected are, therefore, for the most part, those best known, preference having been given to the older and more generally cited adjudications on the various points; and the points presented are, it is supposed, sufficiently elementary in character to deserve introduction in the early stages of legal study.

In the allotment of space to the several subjects, I have been guided partly by my own impression of their relative importance and partly by observation of their difficulty from the standpoint of the student. One or the other of these considerations will account for the apparently disproportionate number of cases upon such topics as Trespass, Conversion, Defamation and Negligence, for the comparatively meager treatment of such as Nuisance, and for the entire omission of a few like Lateral Support. In respect of Interference with Contract, beside the reasons just suggested, it has seemed to me that the law on that subject is at present so diversely declared and in a state so acutely transitional that the topic could not, consistently with the general plan and limits of the present undertaking, be profitably presented.

My experience, both in my own initial study of law and as an instructor, has led me to doubt the availability of cases, in the form in which they are reported, for the reading of the student in the first months of legal learning. The reports are, of course, not intended for institutional purposes; they usually state the facts somewhat too much at large for the easy apprehension of the reader unfamiliar with such literature, and often in confusing connection with matters foreign to the particular point for which the case is consulted; and these circumstances are likely to embarrass one not yet acquainted with the law in gen-

eral and not accustomed to dealing with legal difficulties in concrete presentation. In stating the cases here offered, I have, therefore, endeavored to follow the manner of Mr. Shirley in his Leading Cases on the Common Law, without, however, attempting to emulate the humorous spirit by which he renders his accounts amusing and so the more effective. By setting out shortly the only facts directly bearing upon the proposition sought to be exemplified, much space has been saved, so that a larger number of cases has been made possible, and it is believed that the cases have been made more intelligible and more useful for the purposes to which they are cited.

The comment, or abstracts of lectures, prefixed to the cases on the several subjects is, of course, not intended as a treatise on Torts. Indeed, what I have said generally presupposes on the part of the reader a knowledge of his text, and the effort is principally to reduce into more systematic arrangement the matter already in his mind and to outline the doctrine of the subject with a view to developing the relations of the various elements of the subject. To this end it has occasionally seemed expedient to restate some of the propositions found in the text books, but never to undertake an exhaustive treatment of the topic. It is hoped that these abstracts will be found useful in reviewing, and that, by formulating the principles which underlie the cases, they will assist the student in

> Mastering the lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances.

In the preparation of this work I have become greatly indebted to Mr. Roger O'Donnell and to Mr. Willard Robertson for much laborious and very valuable assistance, both in the examination of authorities and in the composition of the matter selected, most of the work upon the Maryland and the District of Columbia cases having been done by one or the other of those gentlemen.

WASHINGTON,
December, 1915.

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THE NATURE OF TORTS.

An entirely satisfactory definition of a tort has never been achieved. The term is used to designate a body of wrongful acts and omissions—such as assault and battery, slander and libel, trespass, the maintenance of nuisances, negligence—which are, as a whole, wrongful for some other reason than that they violate contractual obligations. Because the most general and most distinctive characteristic of this class of acts is that they are unlawful and injurious without regard to the existence of contractual relations, a tort is sometimes, rather roughly, defined as a wrong which is independent of contract. To say, however, either that everything is a tort which does not violate a contract, or that nothing is a tort which involves a breach of contract, would be widely incorrect and very misleading. The most useful method of apprehending the nature of torts is to consider the various wrongs classified under that name, and, by a comparison of their general features, to form a more or less complete and accurate conception of a tort. This conception, whether or not we shall be able to reduce it to a precise definition, will at the worst serve in the stead of a definition.

Etymology. The word *tort* is derived, (through the French, where it means *wrong*), from the Latin verb *torquere,* to twist or wring, of which the supine form is *tortum;* whence we have such words as *distort, contort, torsion* and *torture* (which was usually performed by twisting the limbs). The mental process from the original to the derivative sense of the word is identical with that by which in English the word *wrong* is derived from *wring;* thus in Wycliffe's translation of the Bible (*circa* 1380) a wry or twisted nose is a "wrong nose." The essential idea embodied in the word *tort* is, therefore, that of wrong, something which is wrung or twisted from what is right or straight; as from the Latin *rectus* we have *rectitude* or *straightness,* and in current colloquial usage a person or an act is stigmatized as crooked when he or it is not straight, that is, what he or it

ought to be. And so late as the reign of Queen Elizabeth the word *tort* signified, in Spenser's poetry at any rate, any wrong or injury.

In modern usage, however, this word has become altogether a technical term of the law; and, while it still conveys the import of wrong, departure from rectitude, violation of right and breach of duty, it is by no means applicable to all the forms of misconduct and delinquency which are covered by such phrases, but is limited to wrongs of a certain character which are technically classed as torts.

Difficulty of Definition. The difficulty in defining the term is due to the fact that the class of wrongs to which it is applied seems, on the surface at least, to have no certain character or recognizable uniformity of quality, those wrongs being of so diverse nature and variant incidents, and in many instances so closely coinciding with wrongs which are other than tortious, that it is hard to discern any characteristic as common to the whole class and by which a tort may be distinguished from every other species of wrongful conduct. Thus, some torts involve positive or even forcible action, as battery and false imprisonment; others are the mere omissions to act, as negligence. In some instances a tort is in its very nature morally wrong, as deceit and seduction; in others the tort may be, and often is committed, without any intentional or conscious wrongdoing, as in trespass, slander, and conversion. Many torts are also crimes, as assault and libel, and negligence which is sometimes the equivalent of manslaughter; while other torts, such as slander and deceit, are not criminal unless by reason of adventitious circumstances or exceptional legislation, and negligence, in some circumstances, involves no criminality. Again, in some cases, the tort is closely associated with a breach of contract and seems to be precisely identical with such breach; thus, the failure of a common carrier to carry safely goods entrusted to him is a breach of his contract, and yet the delinquency is also a tort. So of divers derelictions of professional duty on the part of attorneys, surgeons and certain other classes of persons, whose neglect of business assumed by them is tor-

tious, though it may also involve the failure to observe contractual obligations. This heterogeneous body of wrongs cannot be defined in terms which shall either include or exclude acts, or failures to act, crimes or behavior not criminal, moral delinquencies or conduct not morally culpable, breaches of contract or derelictions of duty wholly unrelated to contracts. Again, as we shall see in the more detailed study of the subject, there are some wrongful acts which render the wrongdoer liable in damages although his misconduct causes no actual loss to the injured party; while in other cases tortious behavior affords no cause of action unless the person affected thereby has sustained some measurable material damage.

Common Characteristics. Two features, however, will be observed as common to all the wrongs which have been mentioned, and will be found in all other torts.

First: In every case the wrong done constitutes a grievance for which the injured party may have redress by means of a civil action, brought by himself and for his own benefit, and brought in a court of common law. The tort may be also a crime, as assault and battery, that is to say, an offence which is deemed injurious to the right of the public, and which is therefore punishable in a criminal proceeding instituted by the state to redress the wrong done to the public. But, at the same time, the delinquency, if it be a tort, is such an infringement of some individual's private right that it is a civil wrong, and the sufferer may obtain damages for the injury to himself by a private action brought in his own name and in a common law court having cognizance of civil matters. So too, in some instances, the person injured by a tort may have some kind of redress or relief in another court than one of common law; thus an equity court may grant an injunction against the maintenance of a nuisance, or a decree of divorce against an unfaithful spouse. But that is not exclusive of a common law action to recover damages for the injurious results of the nuisance or against the adulterer for the seduction of the wife; and, viewed in this aspect, the maintenance of a nuisance and the commis-

sion of criminal conversation are torts, though for them some form of remedy is afforded otherwise than by the common law.

Second: In every case of tort the wrongdoer's conduct is wrongful because it is the breach of some duty which is imposed by the law, as distinguished from the breach of a duty which is affirmatively assumed by him. Thus, where a man commits an assault, or publishes a libel, or trespasses upon the land or goods of another, his act is wrong, not because he has agreed that he would not do what he does, but because the law prohibits him to do that thing. The obligation to refrain from the tortious conduct is independent of any assent, assumption or other voluntary act on his part. It will be observed, however, that this obligation which is created by the law, though independent of the tortfeasor's agreement on the subject, is not necessarily exclusive of some contract and some contractual obligations in the transaction. It may be that the duty which the law prescribes is imposed because a contract exists. Thus, where a common carrier accepts goods for transportation, there is a contract, express or implied, to carry them safely and deliver them according to direction; and for a failure in either of these respects, the carrier is liable as for a breach of contract. At the same time, once the goods are accepted, the law imposes upon the carrier a duty which, though substantially identical with that assumed by his contract, is independent of his contractual obligation and has relation chiefly to the public character of the function which he undertakes to perform. It results then, that, besides the obligation which the contract imposes on the carrier and which may afford cause for an action on the contract, there is another obligation created by the law, for a breach of which the carrier may be liable as for a tort. So, in some cases, a contract may be the means by which a tort is committed, as where one sells goods with a false warranty as to title or quality. Here, the goods proving to be other than as warranted, the vendor is liable as for a breach of contract; but, if the other necessary elements are present in the transaction, he may be liable also for an injurious deceit practised upon the purchaser and made feasible by means of the deception effected by the false warranty.

A single act may, therefore, be at once a tort and a crime, or a tort and a breach of contract, or a tort and a delinquency of some other class. The dual character of such an act need not embarrass us in recognizing and classifying it as a tort if it embodies those incidents which are the common characteristics of all torts. In framing a definition of a tort, it is not easy to embrace such essentials as have been mentioned in any very convenient form of words, or in any words which, of themselves, sufficiently express the distinctions necessary to be observed.

THE ELEMENTS OF A TORT.

The English Common Law Procedure Act of 1852 defined a tort as

"A wrong independent of contract."

This formula has been called a fallacious infelicity; and, in truth, it is likely to be misleading if taken literally and without regard to such characteristics of torts as have been made the subject of the foregoing remarks. At the same time it is probably impossible to formulate a definition which shall, in few and direct words, so accurately indicate the actual nature of a tort and so effectively accentuate its essential feature. As has been pointed out, all torts are wrongful acts, and their most striking characteristic is that the wrongful quality in such acts is not due to the fact that they violate contractual obligations. The Parliamentary definition, while not absolutely accurate, is therefore fairly sufficient for most purposes of speech on the subject; and it is, at any rate, useful as a point of departure for the further study of the subject, and as a nucleus about which may be collected the more distinct and more exact conceptions which we are to acquire in our progress. At the end we shall probably find no better way to define a tort than by saying that it is a wrong independent of contract; though we shall perceive that such language must be understood with a number of tacit qualifications.

Definition. Without hoping to attain a complete or unimpeachable statement of the nature of torts, we may embody some of the tacit qualifications just alluded to into this formula, which may serve, not only as an experimental definition, but as a frame upon which to arrange certain considerations that should engage our attention at this point: A tort is

(1) A wrongful act or omission,
(2) Not a mere breach of contract,
(3) Constituting a legal injury,
(4) Causing legal damage.

I. The Wrongful Act or Omission.

(*a*) Most torts are committed by active conduct, amounting to misfeasance or malfeasance. In some cases, however, the wrongful conduct is not an act but an omission, the failure to act when one is bound to do something, or the not doing that thing as it ought to be done; thus the refusal of an innkeeper to receive and entertain one proposing to become a guest, though a mere non-feasance, is a tort; and negligence is either the total failure to do what is legally requisite or doing it improperly.

(*b*) The *wrong* of the Parliamentary definition, and the wrongful act now in contemplation, must not be understood as including all that is wrong in morals. Manifestly, no court or body of courts could undertake the enforcement of all the precepts of morality. Envy, malice and all uncharitableness, impiety, ingratitude, avarice, most derelictions of parental and filial duty, falsehood, and similar matters of immorality, are in their nature beyond the reach of judicial authority. Such lapses from ethical standards, however wrongful, are not in themselves torts, though in certain combinations with other circumstances they may become the elements of torts.

Nor does a tort necessarily involve moral delinquency in the sense that there must be, on the part of the tortfeasor, any conscious or intentional wrongdoing or any evil or malicious motive or purpose. Thus, trespass may be committed by one who is wholly ignorant that he is trespassing and in innocent mistake of facts: Higginson vs. York, *infra,* and the same is true of con-

version, which is often the result of misunderstanding of legal rights; Cooper vs. Chitty, *infra;* McCombie vs. Davies, *infra;* or even actuated by quite praiseworthy motives: Bristol vs. Burt, *infra;* Parker vs. Godin, *infra.* And so one may be liable for slander or libel committed for a commendable purpose and in the discharge of what seems to be a duty; Byam vs. Collins, *infra.*

The *wrong* of the Parliamentary definition must therefore be taken as a *legal wrong,* that is, something which is by the law recognized as wrongful, the limits of legal wrong not including all that is morally wrong or excluding all that is, according to ordinary moral standards, inculpable.

(*c*) Even the legal wrong covered by the definition must be understood in that sense of the phrase which limits it to such wrongdoing as can be redressed by a civil action in a court of common law. As we have seen, whatever diversities the various torts exhibit, they all possess this characteristic in common, that they are cognizable by a common law court and afford ground for a civil action brought by the person injured. Accordingly, many forms of wrongdoing, though unlawful, are not torts, because they must be punished or corrected otherwise than by an action at common law. Thus, some crimes, *ex gr.* treason, cannot be torts, not being the subjects of civil actions. Conjugal infidelity may afford ground for relief in a court of equity; but it is not a tort, since one cannot obtain a decree of divorce or other redress against a delinquent spouse in a court of common law. So of a failure to pay salvage for a vessel, which is recognized as a breach of legal duty in courts of admiralty but not at common law.

The wrongful act which constitutes a tort must, therefore, be one which is unlawful, as distinguished from immoral, and also one which is cognizable in a common law court, as distinguished from those things which are recognized as wrong in other courts.

II. Independence of Contract.

A contract is created by the act of the parties thereto; the obligation to perform a contract is the result of a voluntary and

express agreement; and the breach of a contract is wrongful only because it is the violation of a duty voluntarily and specifically assumed by the delinquent party.

In torts, on the other hand, the capital characteristic is that they are wrongful and unlawful without regard to any contract or to any other obligation voluntarily assumed. In most instances this difference between a tort and a breach of contract is quite clear, and is readily recognizable as the distinctive feature of the tort. A man undertakes, for a valuable consideration, to pay money at a certain time or to do something else, and he fails to do what he has promised to do; here the delinquency is an actionable wrong, not because any law obliges people to make such promises, but because the particular man has chosen to make a specific promise, and has failed to perform his voluntary obligation. Where, however, one commits an assault, slanders or libels or deceives another, or trespasses upon another's property, the act done is wrongful, not because the tortfeasor has promised that he will not do it, but because the law, without regard to any agreement or assent on his part, makes it his duty to refrain from assaulting, defaming, deceiving and trespassing. The duty thus created by the law is, obviously, not only distinct from, but altogether independent of, anybody's promise, consent or voluntary assumption; and in such cases it is literally true that the tort is a wrong independent of any contract.

In other forms of torts, however, such independence of contract is not so clear. The transaction may involve a contract, and the contract may be broken; and the grievance of the injured party may so closely coincide with the breach of the contract as to seem wholly identical therewith. At the same time, the delinquent, besides breaking his contract, has violated some right of the other party which the law recognizes as growing out of, or annexed to, such contract relations. There is therefore a tort which is distinguishable from the breach of contract, though the tort is, in a certain sense, dependent upon the contract. Having regard to such cases, it will be more accurate and less likely to mislead if, instead of defining a tort as something which is always independent of contract, we say that a tort is

something distinct from the breach of a contract—or, as has been suggested, that a tort is not merely the breach of a contract.

(*a*) A contract may be the means by which a tort is made possible and is effected, and yet the tort is something other than the broken contract, being the breach of some duty collateral to and distinct from the contractual obligation. Such is the case of the false warranty, before mentioned, whereby a purchaser is induced to believe that the goods are as warranted; here the vendor is liable for the breach of contract embodied in his warranty; but he is guilty also of a deceit, which is the violation of a duty not created by the contract, and is a tort of which the broken warranty is but an incident, and an instrumentality; Langridge vs. Levy, *infra*. So where a druggist sells as harmless medicine which is requested one that is a dangerous drug; he commits a breach of contract, it is true, but he commits besides a tort in violating a duty which is independent of the contract with the customer: Thomas vs. Winchester, *infra*.

(*b*) So there may be a course of conduct directed to an injurious and unlawful end, which involves the making and breaking of one or more contracts; and such course of conduct, as a whole, may constitute a tort, which is distinct from the several violations of contractual obligation incident to the general purpose: Rich vs. Railroad Co., *infra*.

(*c*) Again, the same act may be at once the breach of a contract and the violation of a legal duty arising concurrently with, or in direct sequence to, the making of the contract. In such cases the delinquency is of a dual character, being both the breach of a contractual obligation and the violation of a duty imposed by law; and the tort seems, therefore, in a certain sense dependent upon the contract by which the legal duty is accompanied. Thus, you and I are not, in general and independently of some express undertaking, obliged to see to the careful carting of molasses belonging to other persons. But if, in a particular transaction we engage for a consideration to carry a hogshead to a certain place, we assume a contractual obligation which renders it our duty to carry with due care. At the same time, from the moment at which we take manual possession of

the hogshead and commence to perform the service contracted for, the law imposes upon us a duty of its own making—the duty incumbent upon everybody, whether contracting or not, not to be negligent in the management of other people's goods. This legal duty, it will be perceived, is something other than the duty to transport safely and with due care which is prescribed by the contract; it is a duty which would bind us just as validly if there were no contract; and it exists, not by reason of the contract which happens to coexist with it, but by reason of our assuming to perform the service and our taking possession of another's goods. The same duty of due care would exist if we were to receive no payment for our service, being a duty which is incumbent upon even a gratuitous bailee; it is therefore not conditioned upon the presence of a consideration, and cannot depend upon the contract in the case supposed. If, now, we perform the service negligently, we violate the duty of due care which is created by the contract, and we violate also a like duty of due care, which is imposed by law as an obligation additional to that fixed by the contract. The two duties, though coexisting and coincident in extent, are of diverse origin and plainly distinguishable one from the other: Govett vs. Radnidge, *infra.*

Like considerations apply to derelictions of duty on the part of attorneys, surgeons, brokers and men in some other professions to the exercise of which the law attaches certain obligations to faithful and skillful conduct of the vocation assumed by them. In the case of such persons, the obligation to perform any specific service is the result of a voluntary assumption, usually for some consideration; and a failure to perform the service properly is a breach of contract. But such failure is also a breach of the duty legally created and annexed to the practice of the profession; and, therefore, for misconduct in these occupations, the action may be either *ex contractu* or *ex delicto*: Boorman vs. Brown; Burnett vs. Lynch; *infra.* So the law imposes upon common carriers certain duties which, though substantially coincident with those assumed by the contract of carriage, are of different origin and additional obligation; so that a passenger injured by the negligence of a carrier

may recover as for a breach of contract or for the neglect of a duty created by law, that is, a tort: Kemp vs. Rwy. Co., *infra*.

The duty imposed by law in the cases instanced, though coincident in character and extent with the contractual obligation, is not only distinct from the duty fixed by the contract but independent of the contract itself. For, it will be observed, the contractual obligation is created by the contract alone. But the legal obligation to exercise due care, skill and fidelity is created, not by the contract, but by the mere undertaking to perform the service. This duty arising from the assumption of a certain service may exist along with a contract obligation to perform the same service; but it may exist also in the entire absence of contract, being conditioned not upon any agreement but upon the fact that one has assumed to perform the service, and this assumption of service may be made, as an independent act, as well without a prior contract as after the making of a contract. Thus, in Coggs vs. Bernard, 2 Ld. Raym, 909; 1 Smith's L. C. (8th Am. ed.), 369, the defendant was sued for damages due to his negligent management of a cask of brandy which he had undertaken to transfer from one place to another; the declaration alleged the undertaking, the negligence and the damage, but did not show either that the defendant was a common carrier or that he had been promised any payment for his service, and objection was taken to the plaintiff's case on the ground that it failed to show any consideration, and therefore any contract, as a basis for the defendant's liability; but it was held that the defendant was liable for his negligence, not because of a contract—for there was none—but by reason of his undertaking to perform the service, which by law created a duty not to be negligent. The case of Govett vs. Radnidge, *infra,* is identical with Coggs vs. Bernard except for the presence of a consideration, which created a contract; and it was there held that the action for the defendant's delinquency might be brought either *ex contractu* or *ex delicto*. But, though in the latter case there was, in addition to the legal liability for negligence, a contractual liability for failure to perform the contract, the connection of the tort liability with a contract was as accidental as the substitution of the treacle in this case

for the brandy in Coggs vs. Bernard. And the tort liability in the Govett case attached, not upon the contract, but upon the undertaking, just as in the Coggs case, where there was no contract at all, and in both cases was quite independent of any contract.

So a common carrier may undertake to carry goods or a passenger gratuitously, or an attorney to conduct a case without a fee; and in either case, though any contractual obligation is wholly wanting, there is a duty prescribed by law, namely, that the carrier shall carry safely and that the attorney shall exercise his professional faculty with skill and fidelity. These duties, in such situations, are obviously independent of contract—for no contract exists—and arise by mere operation of law from the assumption of the service; and so, where the plaintiff was invited to ride without payment of fare upon a train of the defendant railway company and was injured through the negligence of the company's servants, he was held entitled to recover damages, the court observing: "This duty [to carry him safely] does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous": Railroad Co. vs. Derby, 14 How. 468.

If, now, the carrier should, before the undertaking to render service, bargain for his charges, or the attorney for his fee, there is a contractual obligation superadded to that which the law fixes; and misconduct in the business bargained for may amount to a breach of contract. But that misconduct is also a violation of the duty imposed by law, a duty which depends not upon the contract but upon the assumption of service, a duty which would exist if the service had been assumed without any contract, and therefore a duty for the breach of which the delinquent is liable without reference to the contract which happens to be present in the same transaction. Clearly, then, even in cases wherein the tort is an act identical with a breach of contract, it is the violation of a duty which, though coexisting with a contract, is not only distinct from the contractual obligation but independent of the contract.

III. The Legal Injury.

The word injury, (Latin *injuria,* from *jus,* a right), though it has acquired in English a larger sense, imports only the violation of a right, and, in strictness, only the violation of a right which is recognized by law. With reference to torts, the meaning of the word must be even more strictly limited, so that it shall be applicable only to the violation of such rights as are recognized and protected by the courts of common law, that is to say *legal* rights. It is, therefore, essential to a tort that it shall constitute a legal injury, one which is an injury at common law. This excludes, of course, all injuries which are either

Only breaches of morality, and so not redressible by any kind of law; or

Those injuries for which the remedies must be sought in equity, admiralty, or some other jurisdiction exercised in other than the common law courts. Exclusions of such character as these have already been noticed.

To establish that a given act is a tort, it is, therefore, necessary to establish that it violates some right which is a legal right, and a legal right in the sense of that phrase as here limited. It is not sufficient that the act may cause loss, damage, annoyance or other detriment to some one, if such detriment does not amount to the infringement of some right of the person aggrieved. If the conduct complained of has caused damage without such violation of right, it is said to be a case of *damnum absque injuria,* of damage without injury, that is, without the impairment of a right which the law protects.

Thus, in the case of the Gloucester Grammar Schools, in 1410, the plaintiffs showed that they had for a long time conducted a school at Gloucester, which, being the only school there, had been very profitable, and that the defendant had recently opened a rival school which had drawn off many of the pupils formerly attending that of the plaintiffs, to their great pecuniary damage. It was held that the plaintiffs had suffered no tort, since they had no legal right to the monopoly of teaching at Gloucester, the case being one of *damnum absque injuria.* A like principle is followed in Acton vs. Blundell; Mahan vs. Brown; Hutchins vs. Hutchins; *infra.*

In most cases the existence or the absence of a right is clear and well settled, and settled upon principles which are readily recognized as sound and reasonable. Thus, assault and battery violate the right of personal security, false imprisonment that of personal liberty, defamation infringes the right to keep a deserved reputation, trespass impairs the right of property. *E converso,* in such cases as that of the Grammar Schools, it is manifest that the aggrieved parties have no rights which have been violated; and in most other cases, where the absence of right is not so clear, it will appear upon reflection that the right asserted is not one which can, reasonably, practicably, and consistently with general principle, be enforced by the courts.

In some instances, however, it is not so clear or well settled that the act complained of is or is not the violation of a legal right; and in some others, wherein the law on that point is thoroughly established, the grounds upon the courts have proceeded are not so obvious or so obviously reasonable as in the cases just mentioned.

Thus, the right of privacy, that is, the right to avoid undesired publicity—such as is involved in the use of one's photograph for advertising purposes—is a right which has been recognized by some courts and denied by others. So where one has been made defendant to a civil suit, brought maliciously and without probable cause, but not involving any interference with his liberty or property or any aspersion upon his reputation, can he maintain an action to recover for the trouble and expense to which he has been put?—in other words, is there a legal right to be secure against such malicious litigation, so that in the case supposed there is a legal injury? On this question, as we shall see, the authorities are divided.

And we shall find other cases in which, with respect to various grievances as constituting actionable wrongs, the law is either unsettled or diversely settled, some courts recognizing legal rights which other courts cannot see as such, the same act being in one jurisdiction a legal injury and in another only a matter of bad morality or bad manners for which the law can afford no redress.

Again, there are some acts which are by the courts recognized as in themselves wrongful, and even as violative of rights, but which are not actionable except when attended by certain circumstances, such as actual damage, particular relationships, or other incidents. And the rules by which the law has defined these torts, and selected the circumstances in which a right must be violated in order to be legally vindicated, are not always apparently consistent either with each other or with reason and justice as we, in our ordinary modes of thought, are apt to see reason and justice. Thus:

Carnal intercourse between a man and another man's wife is an actionable wrong to the injured husband, without regard to the previous looseness of the woman's life. The seduction of the man's daughter, though she have been previously innocent, is not a tort unless followed by pregnancy and disability to labor. Negligence, though it is a breach of duty, does not become a legal injury, and therefore actionable as a tort, unless it results in damage. Many words of but slightly defamatory, or even only ridiculous, tendency are actionable if written or printed: Peck vs. Tribune Co.; Levi vs. Milne; *infra;* while many other words of much graver imputation, if merely spoken, are not a tort unless demonstrably resulting in loss to the person slandered: Brooker vs. Coffin, *infra.* So a verbal charge of moral deficiency, or even of specific immorality or other reprehensible conduct, not falling within certain rigidly defined categories, is not an actionable grievance unless it causes actual damage. Pollard vs. Lyon; Ayre vs. Craven, *infra;* and the law's notion of actual damage is occasionally much at variance with that generally prevailing; Roberts vs. Roberts; Allsop vs. Allsop, *infra.*

In respect of these and some similar matters, the law seems to have proceeded upon no fixed principle, if not indeed arbitrarily and capriciously, in selecting the rights which it will protect and in defining the circumstances which must concur with wrongful conduct to constitute a legal injury. Most of these apparent anomalies may be accounted for by historical or other considerations, which may be reserved for later inquiry. For the present, these instances are mentioned by way of sug-

gesting that the legal injury which goes to constitute a tort is not always such a violation of right as would, upon general principles and by consistent reasoning, appear to be justly and appropriately actionable, but is sometimes determined by artificial reasons and apparently arbitrary distinctions. Perhaps it will appear presently that these inconsistencies are due to the necessity of selecting the wrongs that shall be deemed actionable, and that the selection has proceeded upon principles not apparent to casual consideration.

IV. The Legal Damage.

The final constituent of a tort is damage. Where there is a concurrence of injury and damage—*injuria atque damnum*—the tort is complete.

In most instances of tort the damage is readily recognizable and susceptible of demonstration, being actual damage, that is to say, such pecuniary loss, destruction or impairment of property, bodily injury or personal inconvenience, as can be proved by evidence and can also be, more or less accurately, measured in money. Thus, where the plaintiff has sustained personal injuries from the assault or the negligent conduct of the defendant, or the plaintiff's property has been taken, destroyed or damaged by a trespass, or he has been deprived of valuable employment by the slanderous words of the defendant, in each of these and like cases there is the violation of a legal right resulting in actual and demonstrable damage.

The damage, however, which is contemplated by law as an essential element of a tort is not always so easily recognizable, or so obviously identical with damage in the usually accepted sense of that term, as is the damage in the cases just instanced. As we have been obliged to conceive of a tortious injury as somewhat different from injuries in general, so it is necessary to understand the word *damage* in a somewhat limited and technical sense, and as designating only detriment of the character which is recognized by the law as damage, or, as it is phrased above, legal damage. Thus restricted, the word will be found somewhat to vary in its import the same word as generally used.

Thus, the actual and provable damage that results from many acts, which are detrimental to other persons than the actor, and some of which are even wrongful in their nature, is not, of itself, sufficient to constitute a tort; since, as we have seen, unless there be in the transaction also the violation of some legal right, the loss is *damnum absque injuria.*

Neither is actual damage, such as has been exemplified, always requisite to constitute a tort; concerning which two observations must be made:

1. Where a legal right is violated, the law, in general, implies or presumes that damage results; and the tort is deemed to be complete upon the assumption that loss follows the injury, without any proof of actual damage.

2. There are certain situations, however, in which actual damage is requisite to be shown in order to complete the tort; and an act, though in itself wrongful and in its nature tortious, does not become actionable unless some actual loss ensues.

I. **Torts Without Actual Damage.** *Ubi jus, ibi remedium.* Where a man is injured in a right of his, he is entitled to redress in damages; and, as is exemplified in numerous cases, it is not necessary that he show how the injury has operated to his prejudice or prove any substantial, or even any appreciable, detriment; Ashby vs. White; Williams vs. Esling; Marzetti vs. Williams; *infra.*

Even where it can be shown that the plaintiff thus injured has in fact sustained no damage whatever, and even if the tortious act has proven positively beneficial to him, he is still entitled to damages for the infringement of his right. Thus, where a man, being unlawfully arrested, was detained only a few hours and treated with rather substantial hospitality, he was nevertheless allowed very substantial damages for the false imprisonment: Huckle vs. Money, *infra.*

So where the plaintiff has been slandered or libelled—the slander being within the class of words recognized as actionable *per se*—it may be that nobody has in the least credited the charge, and his reputation may even have been enhanced by the

attack upon it; yet the law implies damage from the injury, and he may recover a liberal verdict.

So one commits a trespass by merely stepping upon the land of another, and is liable for at least nominal damages, although it may be apparent that the act has caused not the slightest actual injury to the land or the least annoyance or other detriment to the owner.

II. Torts Only When Damaging. Certain wrongful acts, on the other hand, though of injurious quality and potentially tortious, do not become torts unless they result in actual damage.

Negligence, for example, is a tort in the sense that one acting negligently, where it is his duty to be careful, is responsible for all loss actually accruing to another in consequence of that negligent action; yet one may be as negligent as one pleases without liability to anybody so long as no demonstrable detriment to some persons results from the delinquency. Again, while slanderous words of certain defined character entitle the person defamed to pecuniary recompense, without evidence of actual loss, other slanderous words, though of even more deeply defamatory quality, are not actionable unless demonstrably resulting in damage; thus, to call a physician a quack, or a surgeon a bungler, is a tort for which damages may be recovered, although his professional reputation may be such that no one was influenced by the slander; but to say of the same physician that he is a libertine, which may be generally believed, will not entitle him to an action unless the misconduct imputed is charged as relating to his practice, or loss of profits or some other actual and specific detriment is proven to have resulted from the scandal: Ayre vs. Craven, *infra.*

Likewise, as has been mentioned, criminal conversation is actionable, though the woman's character and conduct be such that her husband could have sustained no appreciable injury from an additional act of adultery on her part; but the seduction of a daughter affords the parent no right to damages unless the intercourse result in pregnancy or other incapacity for service.

In such cases as these the wrongful conduct is or is not a tort accordingly as it is or is not followed by actual loss. There is an apparent anomaly in saying that the person wronged sustains an injury to his legal right if he suffers detriment, but that no right of his is infringed if no loss ensues from the wrong done to him. The seeming inconsistency is reconciled by saying that, in these cases, the right of the person affected is only the right not to be disturbed in such manner as to cause actual damage, and that there is, therefore, no *injuria* except where there is also *damnum*. It is, however, difficult to understand how an act, as one of negligence, should be legally injurious if it by chance occasions some material damage, while the same act should infringe no right at all if, by good luck, it proves harmless; or how defamation violates or does not violate a right according to the accidental consequences of the speech. Here again we must account for the state of the law by reference to the necessity of selecting the subjects of action, a matter to be considered hereafter.

THE MORAL QUALITY OF TORTS.

The essential constituents of a tort, as they have been enumerated, do not include any element of moral delinquency. It is true that a tort must be a wrongful act; but that is wrongful only in the sense of injuring the right of another, and not in the sense of involving malice or evil purpose, or even an intention or willingness to do wrong. As thus understood, a wrongful act may be committed ignorantly, or through blameless inadvertence, or otherwise without actual culpability in morals.

And the truth is, that a tort does not necessarily either include or exclude moral delinquency. Some torts, in their nature, involve immoral conduct, as deceit and seduction. In others the wrongful act is a tort because of its injurious effect upon the person affected, and altogether without reference to the tortfeasor's culpability, knowledge, means of knowledge, or lack of knowledge, good or bad intent, caution or negligence, or other matters bearing upon the moral quality of the act; thus, a man may commit a trespass or a conversion by buying or sell-

ing the stolen goods of another in the ordinary course of business, although the tortfeasor have no reason to suppose, and no means of ascertaining, that he is not entitled so to deal with the goods:

Hoffman vs. Carow, *infra*, p. 296.

So one may innocently and with good intentions defame another, but he will still be liable for the slander or libel:

Bromage vs. Prosser, *infra*, p. 204.

And a man may be guilty of negligence though acting on his own best judgment and according to the lights given him by nature and experience:

Vaughan vs. Menlove, *infra*, p. 466.

Again, in an intermediate class of torts, the wrongful conduct is tortious or not accordingly as it is or is not affected by culpable intent, as malicious prosecution and cases of defamation falling within the scope of privilege.

Theories of Tort Liability. Notwithstanding these diversities in the moral aspects of torts, different legal philosophers have sought to find a uniform moral basis for the whole body of torts and to formulate a consistent theory to account for the liability of the tortfeasor in all cases. In crimes, of course, the liability of the offender rests upon an evil intent, or an intent, at least, to violate some prohibition of the law. In cases of contract the delinquent contractor is liable because he has violated the obligation voluntarily assumed by him for a valid consideration. So it is by some supposed that there exists some ground, common to all cases of tort and valid in morals, to sustain the liability of one committing a tort. Two theories upon this subject are advocated: (1) that a man is under an absolute duty to avoid doing harm to others, and therefore, in whatever he does, acts at his own peril, being liable for the injurious consequences of his action without regard to his motive, intent, knowledge or other facts affecting his moral culpability; and (2) that in the law of torts, as in ethics, lia-

bility depends upon moral delinquency and is limited to cases of culpable conduct.

Color for both of these theories may be found in the actual law of torts; whether that law is wholly consistent with either theory may be doubted after an examination of the various cases which the true theory must cover.

I. **Acting at Peril.** There are, undoubtedly, some classes of torts in which the ground of liability seems to be the assumption that every man is absolutely bound to refrain from causing injury to others. This is called the historical theory, since it accords with the archaic conceptions of tort liability, and since it finds its most complete exemplifications in the torts of earlier development, such as trespass and conversion. According to this theory, since the obligation to avoid injury to the rights of others is absolute, that is, in no degree dependent upon intention or knowledge in any particular case, no man can act save at the risk of liability if his act does to another legal harm, whether intended or unintended, preventable or not so.* This view of the ground of liability was thus expressed in the year 1691:

"In all acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering . . . For, though a man doth a lawful thing, yet, if any damage thereby befall another, he shall answer for it if he could have avoided it":

Lambert vs. Bessey, T. Raym. 421.

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*"It appears morally unreasonable, at first sight, to require a man at his peril to know what land and goods are his neighbour's. But it is not so evidently unreasonable to expect him to know what is his own, which is only the statement of the same rule from the other side. A man can but seldom go by pure unwitting misadventure beyond the limits of his own dominion. Either he knows he is not within his legal right, or he takes no heed, or he knows there is a doubt as to his right, but for causes deemed by him sufficient, he is content to abide (or perhaps intends to provoke) a legal contest by which the doubt may be resolved. In none of these cases can he complain with moral justice of being held to answer for his act. If not willfully or wantonly injurious, it is done with some want of due circumspection, or else it involves the conscious acceptance of a risk. A form of procedure which attempted to distinguish between these possible cases in detail would for practical purposes hardly be tolerable. Exceptional cases do occur, and may be of real hardship. One can only say that they are thought too exceptional to count in determining the general rule of law. From this point of view we can accept, though we may not actively approve, the inclusion of the morally innocent with the morally guilty trespasses in legal classification": Pollock on Torts (Am. ed.), p. 16.

Many of the older cases, most of which are reviewed in Stanley vs. Powell, seem, with more or less consistency and rigor, to proceed upon this theory that a man is liable for the injurious conseqences of his acts, though he may not be morally culpable. A case often cited as embodying this view, though the opinion expressly makes allowance for inevitable accident, is

Weaver vs. Ward, *infra,* p. 252.

Of like tendency, but perhaps even greater strictness, is

Baseley vs. Clarkson, *infra,* p. 252.

Some expressions usually accepted as adopting this theory of absolute liability, occurs in the comparatively modern case of

Leame vs. Bray, *infra,* p. 253.

In trespass, so late as the beginning of the last century, the prevailing understanding of the British bar was that a man is liable for the results of any act done with force which are injurious to another, without regard to the presence or absence of negligence in the act. It was not until the year 1891 that it was fairly established in England that a person is not legally wronged who suffers harm through the doing of a lawful act, done in a lawful manner and without negligence:

Stanley vs. Powell, *infra,* p. 75.

The American cases had developed the law on this subject to the same point at much earlier dates:

Brown vs. Kendall, *infra,* p. 255;
The Nitroglycerine Case, *infra,* p. 259;
Vincent vs. Stinehour, 7 Vt. 62 (1835).

Even with the qualification thus established, the law still, in many instances, holds a man responsible for injuries done by him which he did not intend and which he did not know to be injurious, as in various cases of trespass and conversion already cited, to which may be added:

Wise vs. Withers, *infra,* p. 279;
Burroughes vs. Bayne, *infra,* p. 320.

Also in harmony with this theory of absolute liability are those rules which make a man liable for a nuisance, though he does not intend to create a nuisance or know that he is doing so; and for criminal conversation, though he does not know that the woman is married; and for defamation, though he sincerely believes that what he says is true; and for the wrongful acts of his servants, though he may have forbidden such acts and done all in his power to prevent them:

Limpus vs. Omnibus Co., *infra,* p. 382.

And at common law lunatics and infants are liable for torts committed by them, without regard to their mental and moral incapacities.

The present English law concerning negligence, in some of its applications, is quite as stringent as was the most ancient law, the duty to avoid negligence being, in the case of certain dangerous articles, practically the duty of absolute insurance against harm:

Dixon vs. Bell, *infra,* p. 527;
May vs. Burdett, *infra,* p. 528;
Fletcher vs. Rylands, *infra,* p. 529.

II. **Moral Delinquency.** In another class of torts it is quite clear that a man does not become liable as a tortfeasor unless he is, in a greater or less degree, morally culpable. As has been pointed out, this may be either because the act done necessarily involves moral delinquency, or because such act, though capable of being done innocently, is done in the particular case from an evil motive, for a wrongful purpose, with a culpable indifference to the rights and welfare of another person, or with some other infusion of guilty quality. On some one or more of such grounds there is recognizable culpability in deceit, seduction, malicious prosecution, perhaps in most instances of defamation and negligence.

In order to establish the theory that moral shortcoming is the ground of liability for torts of the class last considered, it seems necessary to declare that negligence is, in itself, a moral delinquency. No doubt that is true in a sense, but hardly so accord-

ing to the notions of morality which are generally entertained. The auctioneer who, as in Hoffman vs. Carow, sells stolen goods in good faith and without reasonable grounds to suspect that they are stolen, may be in some degree negligent in not demanding strict proof of title, but he would not in ordinary speech be pronounced culpably careless. The master whose coachman drives over a pedestrian in the street may be remotely at fault in employing a careless servant; but in the usual case of that character the fault does not imply an immoral disposition or even blameworthy negligence on the part of the master.

THE SELECTION OF TORTS.

Manifestly the law of torts presents many anomalies which it is difficult to account for upon any consistent principle. Besides the diversity in respect of moral quality which has just been considered, there are such apparently irreconcilable incongruities in the matters of legal injury and legal damage as were before indicated. Perhaps the most satisfactory way, as it is the easiest and the safest way, to deal with these anomalies is to abandon the attempt to discover any uniform theory by which to reduce them to logical consistency, and to account for these departures from theoretical symmetry as best we can by viewing the subject in another light.

For, as has been well said, "law is not logic"; and this is especially true of tort law. That branch of the law is not a system formulated as a symmetrical scheme or with any thought of logical coherence. The law of torts is a development, a body of rules of slow growth, added to from time as social progress required, and moulded to meet the exigencies of society and the conceptions of public welfare as those exigencies and conceptions arose and as they varied in the course of time. These rules, including such principles as we can ascertain, together with the exceptions, distinctions and discriminations which seem incongruous, have been adopted by the courts as the best, or the most feasible and most tolerable, solutions for the problems of actual community life. Ignoring the question whether these results were, or are now, the best of all possible solutions,

let us endeavor to discover some of the considerations by which the courts have been influenced in fixing the law of torts as we find it.

I. **Considerations of Policy.** The law of torts took its origin in a rude and turbulent state of society, in which men were much disposed to redress their grievances by the force of their own hands and with the help of their friends and dependents. The endeavor of the courts was to restrain the violence of the time, and to make their judgments serve as a substitute and a remedy for private war. Even so late as the year 1814, an English judge mentions just damages as a preventive of duelling:

Merest vs. Harvey, *infra,* p. 50.

With reference to this purpose, it was more important, when damage had been done, to satisfy the injured party than to consider too nicely the motives or excuses of the tortfeasor. This may account for the rigor of the law as to liability in cases of trespass, battery, false imprisonment and conversion of goods, and for the indisposition of the early law to examine into the intention of the defendant or to make allowance for mitigating circumstances such as ignorance, mistake or innocent purpose. Such wrongs were especially dangerous to the peace, and it may not unreasonably have been considered that a man who put the peace in danger should act at his peril.

So certain kinds of words were more likely than others to provoke a breach of the peace, or to cause an innocent person to be imprisoned or to become an outlaw; wherefore only the more grievous and dangerous words were allowed to sustain an action. Again, between the seduction of a wife and the seduction of a daughter there may have been—and there seems to have been—a difference in respect of the sentiment entertained by the public and the grievance felt by the individual, which would account for treating the one wrong as actionable and the other as not so.

II. **Considerations of Practicability.** Ancient courts found themselves, as have modern courts, obliged to limit the

extent of the remedies they would afford with some regard to what is practicable and practically advantageous; and some of the difficulties by which such limitation of judicial relief was made necessary are easily discernible.

(*a*) The difficulty of ascertaining the truth in respect of a man's knowledge, intention, or other matters having relation to the state of his mind, renders it of doubtful expediency to admit inquiry upon such subjects. Where a defendant had done an actual and visible injury to the plaintiff—as by trespass upon his land or conversion of his goods—it may with some reason have been deemed unsafe to allow the wrong to be excused or explained away upon the ground that the wrongdoer's intention was innocent—that being a point upon which his own declaration was likely to be the only evidence:

Basely vs. Clarkson, *infra*, p. 252.

(*b*) It is manifestly impossible for any judicial system to remedy all the wrongdoing of the world. Courts must make a selection of the grievances which they will undertake to redress; and in so doing they must limit themselves to those which can be practically and effectively dealt with, and the selection must also have some reference to the comparative gravity of various injuries. As Lord Macaulay observes, no one supposes that an orange-woman who blocks the pavement with her cart is more censurable than a miser who manifests ingratitude toward his early benefactor and is otherwise insensible to social duty; but the policeman arrests the orange-woman because her offense is one which the law can define and of which it can take hold, while it would be quite impracticable for any human tribunal to correct the vices of avarice and ingratitude. So the man who builds a spite-fence is probably more censurable and does more harm than if he should trespass upon his neighbor's land; but trespass is a concrete thing which is susceptible of definition and judicial redress, while such treatment cannot be applied to mere manifestations of malice not violating any definite and recognizable right. Again, wrongdoing ranges in degree from mere bad manners and insolent speech—which are tortious in nature because violating a right—to injuries of most substantial

character; and the detriment resulting from derelictions of duty may vary in gravity from the slight emotional discomposure occasioned by uncivil conduct or offensive words to great pecuniary loss or irreparable bodily harm. The line between wrongs which courts will seek to redress and those to be left without legal remedy must be drawn somewhere, and, wherever drawn, it must be, in greater or less degree, an arbitrary division—as the dividing point between minority and full age is an arbitrary date.

Considerations of this character may account for many of the anomalies apparent in the law of torts, such as that involved in treating some wrongs as actionable when they cause actual damage and holding the same conduct not actionable when no such damage can be shown. With respect to negligence, for example, it would, obviously, be out of the question for the courts to consider and compensate every instance of negligent behavior, without regard to the effect of such behavior upon other persons. It is a quite sufficient burden upon the judicial system to remedy the material and measurable injuries due to negligence, without undertaking to reprehend the abstract fault of negligent conduct. The discrimination with reference to this subject does not, therefore, imply that negligence is an injury if it results in actual damage but not a violation of any right if no actual loss ensues; but the rule is merely the result of the necessity to make a selection of redressible wrongs, a necessity created by regard to what is practicable and expedient.

With respect, again, to slanderous words, no body of courts could reasonably attempt to afford redress for all disparaging and abusive language. Nor could anybody formulate a rule which should distinguish in all cases between slanders which will and those which will not cause actual damage or appreciable detriment. Between words which ought always to be actionable, because they are really injurious, and those which ought not to be deemed so, it is impossible to suggest any fixed distinction that will not leave in each class some particular cases which, by reason of exceptional circumstances, would more justly be included in the other. The courts have settled a classification which fairly distinguishes between slanders which are generally

damaging and those of which no such result can generally be assumed; cases of the former character are actionable without proof of actual damage; while in the latter class of cases, recovery cannot be had unless some real and appreciable injury can be shown to have resulted from the words. The distinction is, of necessity, more or less arbitrary, and instances occur on both sides of the line in which the assumption of actual damage or of no damage does not prove true. Moreover, the result is that the law seems to regard the right of reputation as infringed when actual damage results, and to leave the same right unprotected against violations which do not cause measurable pecuniary loss. Such features of the law of torts may be incongruous; but they may be explained by considerations of policy to which logical consistency has necessarily been sacrificed.

III. **Considerations of Morality.** The law of torts expresses, more or less accurately, the public sense of the time in respect of morality and social duty. In historical retrospect it is easy to discern in popular opinion and feeling a progressive ethical development, to perceive that "through the ages one increasing purpose runs, And the thoughts of men are widened with the process of the suns." And the elevation of moral standards and an increasing sensibility to ethical refinements are reflected in the changing attitude of the courts towards many features of torts.

For example, the case of Chandelor vs. Lopus, *infra,* decided in 1603, seems very like an adjudication that a merchant may lawfully tell a lie for the sake of cheating a customer; while in Pasley vs. Freeman, *infra,* a hundred and seventy-five years later, an essentially different view is taken of the legal duty of veracity. Again, at the date of Chandelor vs. Lopus, as Shakespeare abundantly exemplifies, public manners were much looser and popular speech much grosser than in more modern times. Much language, which we now understand as slander of deeply injurious import, was therefore then accepted as expressing nothing more than resentful emotion and idle objurgation. Thus, in 1598, where the plaintiff alleged language imputing harlotry, the court refused to entertain the action, for "to main-

tain actions for such brabling words is against law": Oxford vs. Cross, 4 Coke, 18. So, as we have seen, the early law took little or no account of the defendant's culpability; and comparatively modern cases hold, or have been understood to hold, that merely accidental injuries afford ground of action to the person injured, without regard to the negligence or other fault of the person causing the mischief. In the course of time, a juster view, and one more consistent with ethical principle, has taken the place of that original undiscriminating theory of absolute liability. In like manner, with the development of more delicate sentiment and of a quicker moral sensibility, the seduction of a daughter has come to be recognized as an injury for which the law should afford redress without regard to any material detriment resulting to the father; and, while the law does not, in most States, go quite to that point, the service requisite to sustain the action is almost a fiction, and when established, serves only as a peg upon which to hang damages which have no relation to the value of the service. So again, as we shall see, statutes have altered the original law of torts so as to make the present law conform to a more expanded public opinion of right, justice and duty. Thus, in some States such acts as the building of a spite-fence are positively prohibited; and in many other States, even in the absence of legislation on the subject, it is doubtful whether a man may without liability use his own property merely to gratify his malice against another.

In accordance with the same development, the modern cases tend to modify the common law liabilities of lunatics and infants with increasing consideration for their moral responsibility.

Rich vs. New York Central, &c., Railroad Company, 87 N. Y. 382 (1882).

In or about the year 1850, Rich and some other persons, being residents of Yonkers and owning land in that village, conveyed to the Hudson River Railroad Company some lots situate at the intersection of the company's line with Main street in Yonkers, the purpose of the donation being to secure the

establishment of the company's station at Main street, and the company agreeing to erect and ever after maintain its Yonkers station on the land conveyed. The station was built at the place agreed upon and there maintained for about twenty-five years. Rich owned a number of other lots in Main street, not far from the station, and these lots derived their chief value from their proximity to the station. Main street, crossing the railroad tracks, extended to the bank of the Hudson River, where there were some steamboat docks; and the facility of access to these docks also added to the value of Rich's Main street property. Upon a mortgage of these lots Rich raised $35,000, with which he erected several buildings on the lots; and these buildings, being let for purposes of such business as was suitable to the location, produced sufficient rental to pay the interest on the mortgage notes and to make the property quite valuable.

Rich owned also some land on the Nepperhan River, which was an affluent of the Hudson near Yonkers, and which the company's line crossed by means of a drawbridge. In or about 1877, the New York Central and Hudson River Company, which had succeeded to the corporate rights and obligations of the former Hudson River Company, found it convenient, by reason of its increased traffic, to replace the drawbridge over the Nepperhan by a solid structure; and to this end it procured from the State legislature authority to make the change upon making compensation to the riparian owners above the crossing, whose rights of navigation would be impaired by a solid bridge. In order to evade the necessity of paying the owners of land on the Nepperhan, the company removed its Yonkers station to a point about half a mile from Main street, and announced that the station would not be restored to the original site until those owners should consent to the closing of the bridge without compensation to them. By this action the value of Rich's Main street lots was so seriously impaired that he, along with the other riparian owners, consented to the substitution of the solid bridge, the company at the same time agreeing that it would restore the station at Main street. The new bridge over the Nepperhan having been constructed, the company erected a new station at Main street, but would not open

or use it, now demanding that it should be given authority to fence its line, which would close Main street. By another act of the legislature the common council of Yonkers was given authority to close the street upon payment by the city of damages to the property owners who would be affected by that action. As the closing of Main street would obstruct access from Rich's property to the river, whereby the value of his lots would be impaired to the extent of $50,000, the council was indisposed to impose so heavy a liability upon the city and declined to take the step proposed without Rich's gratuitous consent. This he refused to give; whereupon the company announced that the Main street station would not be occupied until the street should be closed, and continued to use the other station. It resulted that Rich's Main street property was rendered unproductive and he was unable to pay the interest accruing upon his mortgage notes. The mortgagee, having for sometime delayed to enforce his lien in the hope that Rich's difficulties would be cleared up, at length felt obliged to foreclose, and the Main street lots were sold for $20,000, which was much less than their former value, and much less than the indebtedness secured by the mortgage. Thereupon the council passed the ordinance closing Main street and the company immediately thereafter opened the new station at that street.

Upon the statement of these facts, Rich sued the company as for a tort, claiming damages to the amount of $150,000, and apparently preferring the form of action chosen to one in contract in the hope that he should recover larger damages for the wrong conceived as a tort than for the same cause of action formulated as a breach of contract obligations. The defendant contended that Rich's grievance was nothing more or else than the violation of contract obligations on the part of the company, and that his right of recovery was limited to such damages as he had sustained from a specific breach, or specific breaches, of contract. This view prevailed in the trial court, by which the complaint was dismissed as showing nothing constituting a tort.

This action was, however, reversed by the Court of Appeals, which held that, while the case involved the breach of contract

obligations, it embodied also a course of conduct on the part of the defendant which was more than the breach of contracts, and which amounted to a tort—a "scheme to accomplish a lawful purpose by unlawful means"—of which tort the violations of contract rights were the incidents and the instrumentalities.

FINCH, J.: We have been unable to find any accurate and perfect definition of a "tort." Between actions plainly *ex contractu* and those as clearly *ex delicto*, there exists what has been termed a "borderland," where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident, as to make their practical separation somewhat difficult. Moak's Underh. Torts, 23. The text-writers either avoid a definition entirely (Addison on Torts), or frame one plainly imperfect (2 Bouv. Law Dict. 600), or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes (Cooley, Torts, 3, note 1; Moak's Underh. Torts, 4; 1 Hil. Torts, 1). By these last authors a tort is described in general as "a wrong independent of contract." And yet, it is conceded that a tort may grow out of, or make part of, or be coincident with, a contract (2 Bouvier, *supra*), and that precisely the same state of facts between the same parties may admit of an action either *ex contractu* or *ex delicto* (Cooley, Torts, 90). In such cases the tort is dependent upon, while at the same time independent of, the contract; for, if the latter imposes the legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract. 1 Add. Torts, 13. Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test. * * *

At the foundation of every tort must lie some violation of a legal duty, and therefore some unlawful act or omission. Cooley, Torts, 60. The one separate and distinct unlawful act or omission alleged in this complaint, or rather the only one so separable which we can see may have been unlawful, was the unreasonable delay in restoring the depot to its original location; and that was unlawful, not inherently or in itself, but solely by force of the contract with plaintiff. The instigation of the sale on foreclosure, as a separate fact, may have been unkind, or even malicious, but cannot be said to have been unlawful. The mortgagee had a perfect right to sell, judicially established, and

what it might lawfully do it was not unlawful to ask it to do. The act of instigating the sale may be material, and have force, as one link in a chain of events, and as serving to explain and characterize an unlawful purpose, pursued by unlawful means; but in and of itself, it was not an unlawful act, and cannot serve as the foundation of a tort. Randall vs. Hazelton, 12 Allen, 412. We are forced back, therefore, to the contract for re-establishing the depot, and its breach, as the basis or foundation of the tort pleaded. If that will not serve the purpose in some manner, by some connection with other acts and conditions, then there was no cause of action for a tort stated in the complaint. We are thus obliged to study the doctrine advanced by the respondent, and measure its range and extent. It rests upon the idea that, unless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated. And the illustration given is the common case of a contract of affreightment, where, beyond the contract obligation to transport and deliver safely, there is a duty, born of the relation established, to do the same thing. In such a case, and in the kindred cases of principal and agent, of lawyer and client, of consignor and factor, the contract establishes a legal relation of trust and confidence; so that, upon a breach of the contract, there is not merely a broken promise, but, outside of and beyond that, there is trust betrayed and confidence abused. There is constructive fraud, or a negligence that operates as such; and it is that fraud and that negligence which, at bottom, make the breach of contract actionable as a tort. Coggs vs. Bernard, 2 Ld. Raym. 909; Orange Bank vs. Brown, 3 Wend. 161, 162.

So far we see no reason to disagree with the learned counsel for the respondent save in one respect, but that is a very important one. Ending the argument at this point leaves the problem of the case still unsolved. If a cause of action for a tort, as admitted, was stated in the complaint, it helps us but little to learn what it was not, and that it does not fall within a certain class of exceptional cases, and cannot be explained by them. We have yet to understand what it is, if it exists at all, as a necessary preliminary to any just appreciation of the relevancy or materiality of the rejected evidence. The general term, as we have remarked, described the tort pleaded as a "clear case of fraud." If that be true, it cannot depend upon a fiduciary or other character of the relation constituted by the contract merely, for no such relations existed; and there must be some other relation not created by the contract alone, from which sprang the duty which was violated. Let us analyze the tort alleged somewhat more closely.

At the date of the contract, the complaint shows the relative situation and needs of the two parties. The railroad company desired to close the draw over the Nepperhan river, and substitute a solid bridge. With the growth of its business and the multitudes of its trains the draw had become a very great evil and a serious danger. The effort to dispense with it was in itself natural and entirely proper. On the other hand, the plaintiff was both a riparian owner above the draw, and

likely to be injured in that ownership by a permanent bridge, and had suffered, and was still suffering from a severe depreciation in value of his property near Main street by the previous removal of the railroad station. The defendant was so far master of the situation that it could and did shut off the plaintiff to a choice of evils. He might insist upon the draw, and leave his mortgaged property to be lost from depreciation, and save his riparian rights, or he might surrender the latter to save the former. This last was the alternative which he selected, and the contract of 1877 was the result. In the making of this contract there was no deceit or fraud, and no legal or actionable wrong, on the part of the defendant. If it drove a hard bargain, and had the advantage in the negotiation, it at least invaded no legal right of the plaintiff, and he was free to contract or not, as he pleased. The complaint does not allege that at the execution of this agreement there was any purpose or intention of not fulfilling its terms. The tort, if any, originated later. What remains then is this: the railroad company conceived the idea of closing Main street to any travel where it passed their tracks at grade; of substituting a bridge crossing in its stead; and of fencing in its track along the street beneath, so as to compel access to the cars through its depot in such manner that the purchase of tickets could be compelled. This, in itself, was a perfectly lawful purpose. The grade crossing was a death trap, and the interest of the company and the safety of individuals alike made a change desirable, and the closing in of the depot was in no sense reprehensible. But there was a difficulty in the way. The plaintiff again stood as an obstacle in the path. The closing of Main street, though beneficial to the company, was to him and his adjoining property claimed to be a very serious injury. He declined to consent, except upon the condition of an award of heavy damages, and in dread of that peril the common council refused to pass the necessary ordinance. At this point, according to the allegations of the complaint, if at all or ever, arose the tort. It is alleged that the defendant, in order to reach a lawful result, planned a fraudulent scheme for its accomplishment by unlawful means, and through an injury to the plaintiff, which would strip him of his damages by a complete sacrifice of his property. That plan was executed in this manner: The company wilfully and purposely refused to perform its contract. It had built its permanent bridge over the Nepperhan, and so received the full consideration of its promise; its new depot was substantially finished and ready for occupation; and no just reason remained why its contract should not be fulfilled. But the company refused. It did not merely neglect or delay; it openly and publicly refused. The purpose of that public refusal was apparent. It was to drive the plaintiff's mortgagee to a foreclosure; it was to shut out from plaintiff that appreciation of his property which would enable him to save it; it was to strip him of it, so as to extinguish the threatened damages, and thus procure the assent of the common council, and get Main street closed. This unlawful refusal to perform the contract, this deliberate announcement of the purpose not to restore the depot, was well calculated to influence the mortgagee towards a foreclosure.

But the defendant's direct instigation was added. The foreclosure came; the mortgagee bid in the property at a sacrifice; swiftly followed a release of damages, an ordinance of the common council, the closing of Main street, and then the restoration of the depot.

We are thus able to see what the tort pleaded was. It was not a constructive fraud, drawn from a violation of a duty imposed by law out of some specific relation of trust and confidence, but an actual and affirmative fraud,—an alleged scheme to accomplish a lawful purpose by unlawful means. There was here, on the theory of the complaint, something more than a mere breach of contract. That breach was not the tort; it was only one of the elements which constituted it. Beyond that, and outside of that, there was said to have existed a fraudulent scheme and device by means of that breach to procure the foreclosure of the mortgage at a particular time and under such circumstances as would make that foreclosure ruinous to the plaintiff's rights, and remove him as an obstacle by causing him to lose his property, and thereby his means of resistance to the purpose ultimately sought. In other words, the necessary theory of the complaint is that a breach of contract may be so intended and planned; so purposely fitted to time and circumstances and conditions; so interwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate,—as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission.

It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, as in the case referred to in the respondent's argument, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud.

It is then doubtless true that a mere contract obligation may establish no relation out of which a separate or specific legal duty arises, and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. The duty and the tort grow out of the entire range of facts, of which the breach of the contract was but one. The whole doctrine is accurately and concisely stated in 1 Chit. Pl. 135, that, "if a common-law duty result from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract."

Govett vs. Radnidge, 3 East, 62. King's Bench (1807).

Govett employed Radnidge and two other men to load a hogshead of treacle upon a cart, for which service the men were to

be paid. In the loading the hogshead was so negligently handled that it fell to the street and the contents were lost. Govett sued the three contractors for the value of the treacle, alleging that they had engaged to load the hogshead for a certain reward, and had so negligently, unskillfully and improvidently conducted themselves in the business that the treacle was lost. The defendants pleaded not guilty. The jury found a verdict against Radnidge but in favor of the two other defendants. Radnidge moved in arrest of judgment upon the ground that the plaintiff had declared upon a joint contract, whence it resulted, as the argument went, that he was obliged to prove a joint contract and a liability against all the defendants, and could not recover by establishing the liability of only one. This reasoning was sound if the action were only and necessarily one for the breach of a contract; and the plaintiff could recover against less than the whole number of defendants only upon the theory that his cause of action was a tort and not merely a breach of contract. The motion was overruled, and the plaintiff had judgment upon his verdict against Radnidge alone, the court holding that, although the joint contract was the occasion or the means of the plaintiff's injury, and although there was in the transaction an actionable breach of contract, yet there was also a tort, namely the negligence, for which the plaintiff might sue and recover against one only of the defendants.

LORD ELLENBOROUGH: What inconvenience is there in suffering the party to allege his *gravamen*, if he please, as consisting in a breach of duty arising out of a contract for hire, and to consider that breach of duty as tortious negligence, instead of considering the same circumstances as forming a breach of promise implied from the same consideration of hire? By allowing it to be considered in either way, accordingly as the neglect of duty or the breach of promise is relied upon as the injury, a multiplicity of actions is avoided, and the plaintiff, accordingly as the convenience of his case requires, frames his principal count in such manner as either to join a count in trover therewith, if he have another cause of action for the consideration of the court other than assumpsit, or to join with the assumpsit the common counts, if he have another cause of action to which they are applicable.

Burnett vs. Lynch, 5 B. & C. 589. King's Bench (1826).

One Meyrick demised a large dwelling house of his to Sir Robert Burnett for a long term of years, the lessee covenanting to pay a certain rent and to make certain repairs to the premises. Sir Robert died about seven years before the end of the term, whereupon his executors, the plaintiffs in this action, assigned the residue of the term to Lynch, the defendant. The assignment was effected by a deed which was signed only by the executors, and not by Lynch; and this deed declared that the term was assigned to Lynch subject to the payment by him of the rent and to the performance by him of the other covenants contained in the lease from Meyrick to Sir Robert Burnett. Lynch accepted this deed, took possession of the premises, and remained in occupation for several years; but he did not pay the rent due to Meyrick nor did he make the repairs stipulated for in the lease to Sir Robert Burnett. For these delinquencies Meyrick sued the executors of Burnett, the present plaintiffs, and obtained a judgment against them, which they were obliged to pay from the assets of the estate. The executors now sued Lynch, setting out the lease to Sir Robert, the covenants therein contained, the death of the lessee, and the assignment to Lynch; "whereupon," so the declaration averred, "it then and there became and was the duty of the defendant, as such assignee of the demised premises, . . . to perform all and singular the rents and covenants in the said indenture contained"; and this, it was alleged, the defendant had not done, whereby the plaintiffs had been damaged.

At the trial of the case, it was objected that the assignee of the lease was not, by the fact merely of accepting the assignment, and without the execution by him of any contract, ob ligated to perform the covenants of the lease; and also that, if the lessee were so obligated, the present action should have been brought in the form of covenant or assumpsit, as for a breach of contract, and not in the form of case, as for a tort committed in the failure to pay the rent and to make the repairs. Both points were ruled against the defendant; and, as to the latter, it was held that the plaintiffs had the option to proceed

either as for a breach of contract or as for the tortious neglect of a duty arising out of the contract.*

ABBOTT, C. J.: Here the defendant has not engaged by deed to perform the covenants, and consequently covenant will not lie. Then will an action of assumpsit lie? I think it would; but why? Because the defendant has, by taking the estate subject to the payment of rent, and the performance of the covenants in the original lease, thereby made it his duty to pay the rent and perform the covenants; and if, by neglecting that duty, a burden is cast upon the person from whom he took the estate, it seems to me that the law will imply a promise as arising out of that duty, and in that case the action of assumpsit will lie.

But it by no means follows that, because a promise may be implied by law, this action on the case, which is in terms founded on the breach of that duty from which the law implies a promise, may not also be maintainable. Kinlyside vs. Thornton [2 W. Bl. 1111], is an authority from which it may be inferred that either assumpsit or case will lie.

BAYLEY, J.: It is unnecessary to go through the cases in which it has been decided that, although there be an express contract, a party is not bound to resort to that contract as the gist of the action, but he may declare on the tort, and say that the party has neglected to perform his duty. In Dickson vs. Clifton, 2 Wilson, 319 [A. D. 1766], the plaintiff, an owner of a ship, declared that he had retained and

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*In Balt. Pass. Ry. Co. vs. Kemp, 61 Md. 619, the form of the action was thus discussed by:

ALVEY, C. J.: The defendant insists that, while the form of the action is as for a tort, yet the real ground of the right to recover in this case is simply for breach of the contract to carry safely and to put the party down safely. And that being so, according to the contention, it is insisted that, to entitle the plaintiff to damages by reason of a breach of the contract, the injury for which compensation is asked should be shown to be such that it may fairly be taken to have been contemplated by the parties as the possible result of the breach of the contract; that, in this case, no such consequence as the production of cancer in the plaintiff, could have been anticipated as the probable result of the negligent act of the defendant.

A common carrier of passengers, who accepts a party to be carried, owes to that party a duty to be careful, irrespective of contract; and the *gravamen* of an action like the present is the negligence of the defendant. The right to maintain the action does not depend upon contract, but the action is founded upon the common law duty to carry safely; and the negligent violation of that duty to the damage of the plaintiff is a tort or wrong which gives rise to the right of action. If this were not so, the passenger would occupy a more unfavorable position in reference to the extent of his right to recover for injuries than a stranger; for the latter, for any negligent injury or wrong committed, can only sue as for a tort, and the measure of the recovery is not only for the actual suffering endured, but for all aggravation that may attend the commission of the wrong; whereas, in the case of a passenger, if the contention of the defendant be supported, for the same character of injury, the right of recovery would be more restricted. * * *

A passenger may, without doubt, declare for a breach of contract, where there is one; but it is at his election to proceed as for a tort where there has been personal injury suffered by the negligence or wrongful act of the carrier, or the agents of the company; and in such action the plaintiff is entitled to recover according to the principles pertaining to that class of actions, as distinguished from actions on contract.

employed the defendant in his service to be the master and commander of the vessel, and to receive on board at Brough, in the County of York, fifty-six quarters of malt, and to carry and convey the same by water from thence to a place called H. in Yorkshire, and at H. deliver the same to A. B. Now, there can be no doubt that an action of assumpsit might have been maintained against the captain for not receiving and carrying the corn, or for not taking care of the cargo; but the plaintiff described the contract in specific terms, and brought case against the defendant for negligence in the performance of his duty. That could only be because the express contract between the parties created a duty, for the breach of which an action of tort might be maintained. The decision in Bretherton vs. Wood, 3 B. & B. 54, and other cases, are all founded upon the same ground.

LITTLEDALE, J.: But it is said that the plaintiff ought to have brought assumpsit, that being the form of action best adapted to his case. Assumpsit lies where a party claims damages in consequence of a breach of promise not under seal. That promise may either be express or it may be implied from a legal obligation to do a particular act. Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in assumpsit, in which the promise is stated as the gist of the action. But where, from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach. For that is the most accurate description of the real cause of action; and that form of action in which the real cause of action is most accurately described is the best adapted to every case.

Boorman vs. Brown, 3 Queen's Bench, 511 (1842).

Brown was an oil broker, and as such broker was employed by Boorman and his partners to sell for them a quantity of linseed oil. In pursuance of this employment, Brown negotiated a sale of the oil to one Peacock, at a certain price to be paid in cash upon delivery of the goods. The sale and the terms thereof, being reported to the Boorman firm, were accepted by them, and the oil was consigned to Brown for delivery by him to the order of Peacock. The declaration, in the form of an action on the case, after stating these facts, proceeded:

"And thereupon it became and was the duty of the defendant, as such broker as aforesaid, to use all reasonable care and diligence that the said ten tuns of linseed oil should not be delivered to the said James Graham Peacock or any other person without the price thereof being paid to him, defendant, according to the terms of the said contract:

"Yet the said defendant, not regarding his said duty, but contriving and intending to defraud and injure the said plaintiffs, did not nor would use reasonable care and diligence that the said last-mentioned ten tuns of linseed oil should not be delivered to the said J. G. P. or any

other person, without the price thereof being paid to the said defendant, but wholly neglected and refused so to do, and so negligently and carelessly behaved in the premises that, by and through the mere carelessness and negligence of the said defendant, the said last-mentioned ten tuns of linsed oil, after the arrival thereof at London aforesaid, to wit, on [a certain day], were delivered to certain persons carrying on trade under the firm of Messrs. John Hare and Company at Bristol without the price for the same, or any part thereof, being paid by the said J. G. P., or any other person, to the defendant; by reason whereof, and of the said J. G. P. having become a bankrupt, and being unable to pay for the said oil, the plaintiffs have lost and been deprived of the said oil, and of the price and value thereof; to the damage of the said plaintiffs, etc."

After a trial, which resulted in a verdict for the plaintiffs, judgment was arrested by the Queen's Bench, on the ground that the declaration proceeded only as for a breach of the defendant's duty in his character as a broker, namely, the duty to hold the goods until they were paid for, and not for any breach of contract on the part of the defendant; and that the duties of a broker, as defined by law, do not embrace any duty of the character assumed.

The judgment accordingly entered was reversed by the Exchequer Chamber, which court held that the duty to hold the goods until paid for resulted from the contract stated, and that, for the breach of such duty, an action of tort, as well as one *ex contractu*, was maintainable.

TINDAL, C. J.: The defendant makes two objections to the plaintiffs' right to recover in this action. First, that the action is brought for a non-feasance only, not for a misfeasance, and on that account it should have been, as he contends, an action of contract, not an action of tort; and, secondly, that the duty stated in the declaration does not arise from the facts therein alleged.

That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach or the non-performance is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons and other professional men for want of competent skill or proper care in the service they undertake to render; actions against common carriers, against shipowners on bills of lading, against bailees of different descriptions; and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff. And, as to the objection, that this election is given only where the plaintiff sues for a misfeasance and not for a non-feasance, it may be answered that in many instances it is extremely difficult to distinguish a mere non-feasance from a misfeasance; as in the particular case now before us, where the contract stated in the declaration on the part of the broker is, in substance, to deliver the goods of the plaintiffs to the purchaser on payment of the price in ready money, and where, if the broker delivers without receiving the price, the breach of his direct undertaking is as much a wrongful act done by him, that is a misfeasance, as it is a non-feasance, the distinction between the two being in that case very fine and scarcely perceptible. But, further, the action of case upon

tort very frequently occurs where there is a simple non-performance of the contract, as in the ordinary instance of case against ship-owners, simply, for not safely and securely delivering goods according to their bill of lading; and as in the case of Coggs vs. Bernard, 2 Ld. Raym. 909, where an undertaking is stated in the declaration as the ground of action; and, to give no further instance, the case of Marzetti vs. Williams [1 B. & Ad. 415], where the decision, that the plaintiff was entitled to nominal damages, without proof of any actual damage, rests entirely on the consideration that the action, an action on the case, was founded on a contract, not on a general duty implied by law.

The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform that duty, or the non-feasance, is a ground of action upon a tort.

Emigh vs. Railroad Company, 4 Bissell, 114. United States Circuit Court for Indiana.

The declaration stated that the defendant was a common carrier, and as such had contracted to transport the plaintiff between certain points, but had refused so to do and had wrongfully ejected him from its train. On the question whether this count was in assumpsit or case, it was said by

McDONALD, Circuit Judge: As I understand it, the subjects proper for action on the case are of two distinct classes. First, where there is a tort committed without force, on the person, character or property of the plaintiff, entirely unconnected with any contract. Secondly, when there is a contract, either expressed or implied, from which a common law duty results, an action on the case lies for a breach of that duty; in which case the contract is laid as mere inducement, and the tort arising from the breach of duty is the *gravamen* of the action. Thus, if a lawyer or a physician is engaged by special contract to render professional services, and if, in the performance of such services, he is guilty of gross ignorance or negligence, an action on the case will lie against him, notwithstanding such special contract. So this form of action lies against agents, wharfingers and common carriers, whether acting under a contract express or implied. Indeed, nothing is more common in the common law courts than the action on the case against common carriers of goods, though their engagements are always on contract, express or implied. If I hire a man to carry goods from Indianapolis to Cincinnati, and he wrongfully leaves them on the way at Lawrenceburg, no lawyer will doubt that an action on the case will lie for this breach of duty.

Ubi Jus, Ibi Remedium.

Ashby vs. White, 2 Lord Raymond, 938. King's Bench (1703).

At a general election for members of the House of Commons, held in 1701, the qualified voters of the borough of Aylesbury were entitled to choose two burgesses to represent the borough in Parliament. White and three other persons, who were afterwards made the defendants in this action, were constables of Aylesbury and *ex officio* charged with the duty of receiving the votes of qualified electors and were authorized to declare the result of the election. Ashby was legally entited to vote at this election and offered to give his vote for two persons legally eligible. Ashby, however, and the candidates named by him were Whigs, and the constables were Tories. For this reason, or for some other, White and his fellow judges, refused to accept the vote of Ashby, and he was not permitted to exercise his right of voting for representatives in Parliament.

Whether the persons named by Ashby were declared to be elected does not appear from the record. The declaration, which is set out in Latin at 2 Ld. Raym. 938, and translated at 3 Ld. Raym. 300, avers that "two burgesses of that borough were elected for the parliament aforesaid (he, the said Matthias Ashby, being excluded as is above set forth) without any vote of him the said Matthias Ashby, . . . to the enervation of the aforesaid privilege of him the said Matthias Ashby of and in the premises aforesaid." Mr. Shirley, in his Leading Cases, states that Ashby's candidates were successful. LORD CAMPBELL, however, in his Lives of the Chief Justices, evinces an understanding to the contrary.

At any rate, Ashby brought this action on the case against White and the other constables for the refusal of the plaintiff's vote, claiming damages in the sum of £200. The defendants pleaded not guilty, and at the trial the plaintiff obtained a verdict. The defendant moved in arrest of judgment. Of the four judges of the King's Bench, three were of opinion that the plaintiff was not entitled to recover; and, while those judges did not altogether agree in their reasons, the grounds upon

which they held against the plaintiff were: first, that the defendants were judges, or *quasi*-judges, and exercising a kind of judicial authority in passing upon the qualifications of electors; second, that the plaintiff's right to vote was a matter for ultimate determination by the Parliament and not by the courts; third, that the plaintiff had no valuable interest in his right of voting; and, fourth, that, if the defendants had been guilty of wrongdoing, they should be prosecuted criminally and not civilly. HOLT, C. J., was alone in holding in favor of the plaintiff, and delivered the celebrated opinion from which an extract is below set out. Judgment was accordingly arrested. The plaintiff thereupon obtained a writ of error upon which the case was heard by the House of Lords. That court reversed the judgment had below and held in favor of the plaintiff and in accordance with the opinion of Holt.

While the case is good authority upon the point that a remedy must exist for every violation of a right, it must not be taken as establishing that judges of elections, as such officers act under contemporary American statutes, are universally liable in damages for the erroneous rejection of votes.

HOLT, C. J.: If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; want of right and want of remedy are reciprocal. * * *

And I am of opinion that this action on the case is a proper action. My brother Powell, indeed, thinks that an action on the case is not maintainable, because here is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it doth not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary; but an injury imports a damage when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing, no not so much as a little *diachylon*, yet he shall have action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there. And in these cases an action is brought *vi et armis*. But for an invasion of another's franchise, trespass *vi et armis* does not lie, but an action of trespass on the case; as where a man has *retorna brevium*, he shall have an action against any one who enters and invades his franchise, though he lose nothing by it. So here, in the

principal case, the plaintiff is obstructed of his right, and shall therefore have his action.

Williams vs. Esling, 4 Barr, 486. Pennsylvania (1846).

Williams was entitled to a right of way over a court, the soil of which belonged to another person. In this court Esling would occasionally deposit divers goods of his, which obstructed the passage; but in each instance the deposit was only temporary, and the plaintiff was at no time actually obstructed or otherwise hindred in the enjoyment of his right of passage through the court. Williams brought this action of trespass on the case and proved several acts of obstruction which would have obstructed the plaintiff had he been desirous to use the passage at the times when the defendant's goods happened to be in the court. But, because it could not be shown that the plaintiff had ever been actually inconvenienced or otherwise sustained actual damage, the trial court held that he could not recover. The Supreme Court of the State, however, held that the mere infringement of the plaintiff's exclusive right to use the court entitled him to damages, without regard to any pecuniary detriment or other injury.

GIBSON, C. J.: Now, the grant of a way is exclusive, at least as to strangers; and that every intrusion into the enjoyment of an exclusive right subjects the wrongful participant to an action by the owner of it, was directly adjudged in the case of the Dippers at Tunbridge Wells: Weller vs. Baker, 2 Wilson, 422 [A. D. 1769], who recovered on an action against one who had usurped the office of a dipper, not having been duly chosen at the court baron. The court held that the very act of intrusion was both an injury and a damage—an injury by disturbing the plaintiffs in the exercise of their right; and a damage in depriving them of gratuities which they might have received; and it was held that an action on the case lies for merely a possibility of damage. Yet the dippers were not more impeded in their functions by the intrusion there than was the plaintiff in the actual use of the alley by the intrusion here; for they were left to get all they could earn, and it was not certain that they would have earned a farthing of what the intruder got. * * *

The very breaking in upon the plaintiff's privacy was a damage; and if the plaintiff could not sue for it because the extent of it was inappreciable, the defendants might establish a right of participation in the use by acts of intrusion repeated for twenty years. * * * The legal title to the soil is in the common-law heir of the purchaser of it, who

annexed the use of it to the Chestnut street lots, with which he subsequently parted; and as he has no beneficial interest involved in it, or motive to burden himself with a law-suit for a trespass upon it, the defendants would certainly gain a concurrent right to the easement by adverse user of it if no one else could sue for anything short of an actual hindrance in the enjoyment of it. Who could contest the matter with them? The plaintiff would scarce bring a separate action for each obstruction, or sue for damage to the amount of a few cents, for the detention of his carriage or his cart for a few minutes; for, though these petty annoyances are exceedingly irksome in the aggregate, not one of them, singly, would be worth the trouble of a law-suit. He might as well give up his right at once as to attempt to maintain it by repeated actions for repeated hindrances. But the measure of damages is not the extent of each particular loss. The right being established, a jury is at liberty to enforce it by making the offender smart for any further violation of it. When the plaintiff showed that impediments were placed in the alley which might have prevented him from attempting to use it, he showed enough to entitle him to a remedy without proof of an attempt actually frustrated; and an intruder can ask no more.

Judgment reversed.

Acker vs. McGaw, 106 Md. 536 (1907).

McGaw had conducted a grocery business in property which he leased for $8,000 per year. He disposed of the business to the plaintiff; assigned the lease and transferred all his interests, stock and good-will with the understanding that he was to become the resident manager. The lease was assigned to Acker with the consent of the lessor.

The plaintiff having, toward the end of the term, been notified by the lessors that the lease was about to expire instructed the resident manager McGaw to negotiate for him a renewal thereof. A month later the plaintiff learned that McGaw had taken a three year lease in his own name at $8,000 per year.

The plaintiff compelled McGaw to assign the lease to him, but the lessors would not agree to the assignment, as was necessary, alleging that an offer of $9,000 had been made for the premises. This offer was made by two men with whom the defendant intended to form a partnership and with whom such partnership was soon thereafter formed.

Acker took for himself a new lease at $9,000 a year, and then brought this action for damages. Held, that, as the defendant failed to secure a renewal at the original rental, which he could have done, and as the plaintiff was compelled to pay a larger rent in consequence of a counter offer made in the interest of the defendant, the defendant was guilty of a violation of the duty owed his employer and was liable for the damage or loss occasioned by such omission.

BURKE, J.: A person commits a tort, and renders himself liable to an action for damages, who commits some act not authorized by law, or who omits to do something which he ought to do by law, and by such an act or omission either infringes some absolute right, to the uninter-

rupted enjoyment of which another is entitled, or causes to such other some substantial loss of money, health or material comfort, beyond that suffered by the rest of the public. The two essential elements, therefore, necessary to sustain the action are—

1. A wrongful act or omission of duty by the defendant; and

2. Damage or loss to the plaintiff in consequence of such act or omission.

Marzetti vs. Williams, 1 B. & Adolph, 415. King's Bench (1830).

Williams and Company were bankers, and Marzetti, a wine merchant, was one of their depositors. At the close of business on December 17th, Marzetti's account showed to his credit a balance of £69 19s. 6d. On the 19th, shortly before eleven o'clock in the morning, Marzetti deposited £40. A few minutes after three in the afternoon of that day Sampson and Hooper presented at the bank for payment Marzetti's check for £87 7s. 6d. The clerk to whom the check was presented looked at the account, and, as the last deposit had not yet been entered, found to the credit of Marzetti only the balance of the 17th. Payment of the check was therefore refused. The check was paid on the following day.

Marzetti brought this action on the case, setting forth the duty of the defendants as bankers to pay the checks of customers and alleging a breach of that duty in respect to his check. At the trial he proved the facts which have been stated, but there was no evidence that he had sustained any pecuniary loss or other actual damage from the refusal of payment. The judge observed that it could not be expected, if a sum of money was paid to a clerk in a large banking office, and immediately afterwards a check was presented to another clerk in a different part of the office, that the clerk to whom the check was presented should be immediately aware of the deposit, but a reasonable time must be allowed for knowledge of the deposit to be brought to the officers of the bank. He therefore directed the jury to consider whether in this case a reasonable time had elapsed between Marzetti's deposit on the 19th and the presentation of his check for the employees of the bank to learn of the deposit; and, if the jury should find affirmatively on that point, they

should return a verdict for the plaintiff. The plaintiff had a verdict for nominal damages. There was no evidence of malice, and the trial court held that the verdict in effect negatived malice.

On motion for a new trial it was contended on behalf of the defendant that, as the plaintiff's case was for a breach of legal duty, and not for a breach of contract, he was not entitled to even nominal damages without proof of actual damage sustained. The court, however, held that the instruction given at the trial was correct and gave the plaintiff judgment on the verdict.

LORD TENTERDEN, C. J.: Now this action is, in fact, founded on a contract, for the banker does contract with his customer that he will pay checks drawn by him, provided he, the banker, has money in his hands belonging to that customer. Here that contract was broken, for the defendants would not pay the check of the plaintiff, although they had in their hands money belonging to him, and had had a reasonable time to know that such was the fact. In this case a plaintiff might, for the breach of that contract, have declared in assumpsit. So in Burnett vs. Lynch, 5 B. & C. 589, the plaintiff might have declared as for breach of a contract. It is immaterial in such a case whether the action in form be in tort or in assumpsit. It is substantially founded on a contract; and the plaintiff, though he may not have sustained a damage in fact, is entitled to recover nominal damages.

TAUNTON, J.: The defendants were guilty of a breach of duty, which duty the plaintiff at the time had the right to have performed. The jury have found that, when the check was presented for payment, a reasonable time had elapsed to have enabled the defendant to enter the £40 to the credit of the plaintiff, and therefore they must or ought to have known that they had funds belonging to him. That was sufficient to entitle the plaintiff to recover nominal damages, for he had a right to have his check paid at the time when it was presented, and the defendants were guilty of a wrong by refusing to pay it. The form of the declaration, whether it be in tort or assumpsit, makes no substantial difference, nor can it be any real ground of distinction whether the foundation be an express or an implied assumpsit.

There are many instances where a wrong, by which the right of a party is injured, is a good cause of action although no actual damage may be sustained. Trespass *quare clausum fregit* is maintainable for an entry on the land of another, though there be no real damage, because repeated acts of going over the land might be used as evidence of title to do so, and thereby the right of the plaintiff might be injured. So an action may be maintained by a commoner for an injury done to his common without proving actual damage. In Wells vs. Watling, 2 Sir W. Black, 1233, which was an action by a commoner for sur-

charging the common, the evidence was the defendant in the year 1777 turned on a greater number of sheep than he ought. There was no evidence that the plaintiff had turned on any sheep in that year. It was objected that the action was not maintainable because the plaintiff, not having used the common during the period of the defendant's misfeasance, could not by possibility have sustained any damage. But it was held that the action was maintainable. LORD C. J. DE GREY said that it was sufficient if the right be injured, whether it be exercised or not; and NARES, J., observed that in the case of the Dippers at Tunbridge Wells, 2 Wilson, 414, it was held that a probable damage was sufficient on which to found an action.

Keeble vs. Hickeringill, 11 East, 574. King's Bench (1706).

The plaintiff's declaration alleged that he was possessed of a certain close, "*et de quodam vivario*, called a decoy-pond, to which divers wild fowl used to resort and come; that the plaintiff had at his own costs and charges prepared and procured divers decoy-ducks, nets, machines, and other engines for the decoying and taking of the wild fowl, and enjoyed the benefit of taking them; that the defendant, knowing which, and intending to damnify the plaintiff in his said vivary, and to fright and drive away the wild fowl used to resort thither, and to deprive him of his profit, did . . . resort to the head of the said pond and vivary, and did discharge six guns laden with gunpowder, and with the noise and stink of the gunpowder did drive away the wild fowl then being in the pond . . . whereby the wild fowl were frighted away and did forsake the said pond."

The plaintiff obtained a verdict upon this declaration. It was moved in arrest of judgment that he was not entitled to recover on the case stated, there being shown no trespass upon his land nor even any direct interference with the birds. It was held, however, that the defendant was liable for the disturbance of the plaintiff's rights in the pond.

HOLT, C. J.: I am of opinion that this action doth lie. It seems to be new in its instance, but it is not new in the reason or principle of it. * * *

Then, when a man useth his art or his skill to take them [the ducks], to sell and dispose of for his profit, this is his trade; and he that hinders another in his trade or livelihood is liable to an action for so hindering him. Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? Though they do not effect any damage, yet they are mischievous in themselves, and therefore in their own nature productive of damage; and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade, that may bring damage to him, though they do not charge him with any crime that may make him obnoxious to punishment; to say a merchant is broken, or that he is failing, or is not able to pay his debts, 1 Roll. 60, 1; all the

cases there put. How much more when the defendant doth an actual and real damage to another when he is in the very act of receiving profit by his employment. * * *

But if a man doth him damage by using the same employment; as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff; no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. This is like the case of 11 H. 4, 47. One schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to the new. (The action there was held not to lie.) But suppose Mr. Hickeringill should lie in the way with his guns, and frighten the boys from going to school, and their parents could not let them go thither; sure that schoolmaster might have an action for the loss of his scholars.

Huckle vs. Money, 2 Wilson, 205. Common Pleas (1763).

The Secretary of State had issued what was called a general warrant, *id est,* one in which no person is designated by name, authorizing the arrest of "the authors, printers and publishers of a seditious and treasonable paper entitled The North Briton, Number XLV, Saturday, April 23, 1763," the North Briton being the periodical employed by John Wilkes as the vehicle for his attacks upon the Government. By authority of this warrant, the defendant, a King's messenger, arrested the plaintiff, who was a journeyman printer employed at a guinea a week, and who was suspected of having been concerned in the publication of the obnoxious newspaper. It was held that the warrant was void for the reason that it did not identify by name or otherwise the persons intended to be arrested, but left that matter to the discretion of the officer executing the process. Although it was shown at the trial that the defendant had kept the plaintiff in custody only about six hours and had "used him very civilly by treating him with beefsteaks and beer," the jury allowed the plaintiff damages in the sum of £300. This verdict the court refused to disturb.

PRATT, L. C. J.: In all motions for new trials, it is absolutely necessary for the court to enter into the nature of the cause, the evidence, facts, and circumstances of the case, as for a jury; the law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts and circumstances; torts, or injuries which may be done by one man to another, are infinite; in cases of criminal conversation,

battery, imprisonment, slander, malicious prosecutions, etc., the state, degree, quality, trade or profession of the party injured, as well as of the person who did the injury, must be, and generally are, considered, by the jury in giving damages. The few cases to be found in the books of new trials for torts shew that courts of justice have most commonly set their faces against them; and the courts' interfering in these cases would be laying aside juries. Before the time of granting new trials, there is no instance that the judges ever intermeddled with the damages.

A warrant was granted by LORD HALIFAX, Secretary of State, directed to four messengers, to apprehend and seize the printers and publishers of a paper called the North Briton, Number 45, without any information or charges laid before the Secretary of State, and without naming any person whatsoever in the warrant. Carrington, the first of the messengers to whom the warrant was directed, from some private intelligence he had got that Leech was the printer of the North Briton, Number 45; directed the defendant to execute the warrant upon the plaintiff, one of Leech's journeymen, and [the defendant] took him into custody for about six hours, and during that time treated him very well; the personal injury done to him was very small, so that, if the jury had been by their oath confined to consider the mere personal injury only, perhaps £20 damages would have been thought damages sufficient. But the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial. They saw a magistrate over all the King's subjects exercising arbitrary power, violating *Magna Charta*, and attempting to destroy the liberty of the kingdom by insisting upon the legality of this general warrant before them. They heard the King's counsel, and saw the Solicitor of the Treasury, endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition, a law under which no Englishman would wish to live an hour; it was a most daring attack upon the liberty of the subject. * * * Upon the whole, I am of opinion that the damages are not excessive; and that it is very dangerous for the judges to intermeddle in damages for torts. It must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages.

Merest vs. Harvey, 5 Taunton, 442. Common Pleas (1814).

The plaintiff, a gentleman of fortune, was shooting upon his estate when the defendant, who was a banker, a magistrate and a member of Parliament, and "who had dined and drank

freely," passed along the road in his carriage and, quitting it, went up to the plaintiff, proposing to join the party of the latter. The plaintiff declined the proposal and warned the defendant not to shoot upon the land. The defendant, using profane and abusive language, fired several times at birds, threatened in his capacity of magistrate to commit the plaintiff, and defied him to bring an action.

Merest sued in trespass for damages in £500, and the jury allowed him that full amount. The court refused to set aside this verdict as excessive.

GIBBS, C. J.: I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages? To be sure, one can hardly conceive worse conduct than this. What should be said to a person in a low situation in life who should behave himself in this manner? I do not know upon what principle we can grant a rule [for a new trial] in this case, unless we were to lay it down that the jury are not justified in giving more than the absolute pecuniary damage that the plaintiff may sustain. Suppose a gentleman has a paved walk in his paddock, before his window, and that a man intrudes and walks up and down before the window of the house, and looks in while the owner is at dinner, is the trespasser to be permitted to say, "here is a half-penny for you, which is the full extent of all the mischief I have done"? Would that be compensation? I cannot say that it would be.

HEATH, J.: I remember a case where the jury gave £500 damages for merely knocking a man's hat off; and the court refused a new trial. * * * It goes to prevent the practice of duelling if juries are permitted to punish insult by exemplary damages.

Damnum Absque Injuria.

Roberts vs. Roberts, 5 B. & S. 384. Queen's Bench (1864).

The defendant Roberts addressed to Roberts the male plaintiff words imputing gross unchastity to the wife of the latter. By reason of this slander, Mrs. Roberts was expelled from the church of which she was a member, which fact rendered it impossible for her to be admitted to membership and communion in any other church of the same denomination. Mrs. Roberts was also greatly injured in her good name and reputation, and was so greatly distressed in mind that she became ill and fell into bad health, on account of which her husband was put to

great expense for medical attention to her. Mr. and Mrs. Roberts sued the defendant, the declaration alleging the utterance of the defamatory words and setting out as special damage the consequences which have been stated.

On demurrer to the declaration the case stated was held insufficient to entitle the plaintiffs to recover, the words not being actionable without proof of special damage resulting therefrom, and the results alleged not constituting special damage.

COCKBURN, C. J.: No cause of action is shown in this declaration, as it does not allege special damage sufficient to make the words spoken of the female plaintiff actionable. It is admitted that the loss of *consortium vicinorum* is not sufficient; and I am of opinion that the loss by the female plaintiff of membership of this society and congregation, which appears to have been constituted for religious or spiritual purposes, amounts at most to no more than the loss of the merely nominal distinction of being able to call herself a member of it. It does not appear that any real or material advantages attach to membership; such as the loss of a seat in the chapel, or of the opportunity of attending divine worship there. If, by reason of the words spoken, the female plaintiff had been excluded from the meetings for religious worship, or from anything substantial which by right attached to membership of the society, I should be disposed to hold that it was sufficient special damage. I think that to prevent a woman whose character for chastity is assailed from bringing an action for the purpose of vindicating it is cruel; but, as the law at present stands, such an action is not maintainable, unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. That is not shown in this declaration, and therefore I reluctantly hold that the demurrer is good. If, upon further inquiry, anything can be found amounting to such special damage as the law requires, the plaintiffs may have leave to amend their declaration.

Acton vs. Blundell, 12 M. & W. 324. Exchequer (1843).

The plaintiff, a cotton-spinner, had provided a sufficient supply of water for his mill by digging upon his land a well; and this well had, before conditions were changed in the manner now to be stated, been in satisfactory use for about sixteen years. At the end of that period the defendant, having leased a tract of coal-land about half a mile distant from the plaintiff's mill, sank in that land a pit which extended to a stratum of coal lying eighty yards below the surface of the ground. Into this pit there flowed from the surrounding soil much

water, and the defendant kept the pit dry enough for mining purposes by means of pumps which exhausted the inflowing water. It appeared that the plaintiff's well was supplied by the same veins of water which flooded the defendant's mine, so that the pumping operations of the latter caused the well to become dry and useless for the needs of the mill.

The plaintiff brought this action for the damage sustained by him in respect of his well, alleging that he had, before the grievances complained of, "used and applied the water of certain underground springs, streams and water-courses, and by reason thereof . . . of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the water of the said springs, streams and water-courses, which . . . of right ought to have run, flowed and percolated, and still of right ought to run, flow and percolate," to his premises, and alleging also that the defendant had "diverted and carried away" the waters of the said underground springs and had "hindered and prevented the same from running, flowing and percolating in and along their usual courses." At the trial the facts were proved as they have been stated.

Held, that the plaintiff had, in respect of the subterranean water which supplied his well, no such right as entitled him to demand damages for the diversion of the water in the manner and under the circumstances shown in this case.

TINDAL, C. J.: It is scarcely necessary to say that we intimate no opinion whatever as to what might be the rule of law if there had been an uninterrupted user of the right for more than the last twenty years; but . . . we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within the principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

Mahan vs. Brown, 13 Wendell, 261. New York (1835).

(THE SPITE-FENCE CASE.)

Mrs. Mahan occupied a house in which were fifteen windows overlooking the adjoining lot owned by Brown. The latter, conceiving some ill-will toward Mrs. Mahan, out of his mere malice —or, as the declaration alleged, "wrongfully and unjustly intending to injure the plaintiff, and to deprive her of the use and enjoyment of the windows, and to annoy and incommode her in the occupation of her dwelling-house, and to obstruct her in the business of a keeper of a boarding house, wrongfully, wantonly and maliciously"—erected a fence twenty feet high on the edge of his lot. It was also alleged that this was done for the sole purpose of annoying the plaintiff, and without any benefit or advantage to the defendant. By means of the fence, Mrs. Mahan's amenity of prospect was destroyed, her house was greatly darkened, and the flow of light and air thereto was much obstructed, so that many of her boarders left her and her apartments became untenanted, to her great pecuniary loss. It did not appear, however, that the windows had overlooked Brown's land for the period of prescription requisite to invest them with the quality of ancient lights. The plaintiff, therefore, had no legal right to the privilege of looking out upon her neighbor's property. It was, accordingly, held that she had sustained no legal injury from the construction of the fence, however malicious and reprehensible may have been the motives which actuated the defendant.

SAVAGE, C. J.: The present is not a case of ancient lights. It is not contended that the action can be sustained upon that ground, but upon the principle that no one shall so use his own property as to injure another. Thus, no man has a right to erect upon his own land, near the house of another, any manufactory which shall poison the air, and render it unwholesome. So in Morley vs. Pragnell, Cro. Car. 510, an action was held to lie by an innkeeper against the defendant for erecting a tallow furnace, which annoyed his house with stenches, by reason of which his guests left him, and his family became unhealthful. So in Aldred's case, 9 Co. 48, the plaintiff brought an action against Burton, the defendant, for erecting a hog-house and putting his hogs therein; and by reason of the fetid smells the plaintiff and his family could not remain in his house. The plaintiff recovered. The defendant moved in arrest of judgment, that one ought not to have so delicate a nose that

he cannot bear the smell of hogs, for they are necessary to the food of man; but it was resolved that the action lay. In these cases, however, it is to be observed that a positive right was invaded. Every person is entitled to use of the elements in their natural purity, and whosoever poisons them or renders them unhealthy, violates that right. The person who makes a window in his house which overlooks the privacy of his neighbor, does an act which strictly he has no right to do; altho' it is said no action lies for it. He is therefore encroaching, tho' not strictly and legally trespassing upon the rights of another. He enjoys an easement therefore in his neighbor's property, which in time may ripen into a right. But before sufficient time has elapsed to raise a presumption of a grant, he has no right, and can maintain no action for being deprived of that easement, let the motive of the deprivation be what it may; and the reason is, that in the eye of the law he is not injured. He is deprived of no right, but only prevented from acquiring a right, without consideration, in his neighbor's property. Suppose an obliging farmer permits his neighbor to pass and repass through his fields, to go to the lands of that neighbor; if this is permitted for 20 years, it becomes an easement, a right of way, which the owner of the soil can not infringe; but at the end of ten years, he chooses, from mere malice or wantonness, to shut up this passage, and refuses permission to his neighbor to pass over his land, as he used to do for ten years past; does an action lie? Most certainly not. And yet the case is not distinguishable, in principle, from that under consideration. The defendant has not so used his own property as to injure another. No one, legally speaking, is injured or damnified, unless some right is infringed. The refusal or discontinuance of a favor gives no cause of action. The plaintiff in this case has only been refused the use of that which did not belong to her; and whether the motives of the defendant were good or bad, she has no legal cause of complaint.

Hutchins vs. Hutchins, 7 Hill, 104. New York (1845).

The elder Mr. Hutchins had made his will, by which he devised a valuable farm to his son William. Another son, Benjamin, having learned of this provision in his father's will, falsely and with the purpose to defeat the intended devise, represented to the father that William was guilty of embezzling some money which his father had entrusted to him, that he had mortgaged some of his father's land, and that he pretended to have a large account against his father, which he intended to present after his father's death and which, if established, would absorb the whole of the estate. The father, believing these representations, was thereby induced to destroy his existing will and to make another, which proved to be his last will and

was admitted to probate as such. From this last will was omitted the devise of the farm to William; and in the will was this passage: "Whereas it has been represented to me that my son William has an extravagant account against my estate, it is my will that, if he brings any more accounts against my estate than the rent of the farm he lives on, then that he have no part of my estate."

After the death of his father, William Hutchins brought this action against Benjamin to recover damages for the action of the latter in procuring the earlier will to be revoked and the devise of the farm to be defeated. *Held,* that the plaintiff had no cause of action, since the alteration of the will, did not affect any right of his, but merely deprived him of an expected gratuity.

NELSON, C. J.: Fraud without damage, or damage without fraud, gives no cause of action; but where both concur, an action lies. Damage, in the sense of the law, may arise out of injuries to the person or to the property of the party; as any wrongful invasion of either is a violation of his legal rights, which it is the object of the law to protect. Thus, for injuries to his health, liberty and reputation, or to his rights of property, personal or real, the law has furnished the appropriate remedies. The former are violations of the absolute rights of the person, from which damage results as a legal consequence. As to the latter, the party aggrieved must not only establish that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie.

Now, testing the plaintiff's declaration by these principles, has he made out a case from which it can be said that damage has resulted to him? I think not. In respect to the farm devised to him by the first will, he fails to show that he had any such interest in it as the law will recognize. The only foundation of his claim rests upon the mere unexecuted intention of his father to make a gift of the property; and this cannot be said to have conferred a right of any kind. To hold otherwise, and sanction the doctrine contended for by the plaintiff, would be next to saying that every voluntary courtesy was a matter of legal obligation; that private thoughts and intentions, concerning benevolent or charitable distributions of property, might be seized upon as the foundation of a right which the law would deal with and protect.

I have not overlooked the cases referred to on the argument, of actions of slander, where special damage must be shown in order to make the words actionable; and where the deprivation of any present substantial advantage, even though gratuitous, such as the loss of customers, of a permanent home at a friend's or advancement in life, and

such like, if the immediate and direct consequence of the words, will sustain the action. (1 Starkie on Slander, 158 to 186, ed. of 1843.) If this description of special damage is to be regarded as the gist and foundation of the action, I rather think the principle should be regarded as peculiar to that species of injury. I am not aware of any class of remedies given for a violation of the rights of property, where so remote and contingent a damage has been allowed as a substantial ground of action.

But the law applicable to the cases referred to proceeds upon the ground that the plaintiff, by the wrongful act complained of, has been deprived of the present, actual enjoyment of some pecuniary advantage. No such damage can be pretended here. At best, the contemplated gift was not to be realized till after the death of the testator, which might not happen until after the death of the plaintiff; or the testator might change his mind, or lose his property.

In short, the plaintiff had no interest in the property of which he says he has been deprived by the fraudulent interference of the defendant, beyond a mere naked possibility; an interest which might indeed influence his hopes and expectations, but which is altogether too shadowy and evanescent to be dealt with by courts of law.

I am of opinion that the defendant is entitled to judgment.

Contribution Between Tortfeasors.

Merryweather vs. Nixan, 8 T. R. 186. King's Bench (1783).

One Starkey brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included a count in trover, for the machinery belonging to the mill; and having recovered £840 he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much money paid to his use.

At the trial, before Mr. Baron Thompson at the last York assizes the plaintiff was nonsuited, the learned Judge being of opinion that no contribution could by law be claimed as between joint wrongdoers; and, consequently, this action, upon an implied assumpsit, could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action.

Chambre now moved to set aside the nonsuit; contending that, as the former plaintiff had recovered against both these parties, both of them ought to contribute to pay the damages. But

LORD KENYON, Ch. J., said, there could be no doubt but that the nonsuit was proper; that he had never before heard of such an action having been brought, where the former recovery was for a tort. That the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit. And that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right. *Rule refused.*

PROXIMATE CAUSE.

There must, manifestly, be some limit to liability for torts. An attempt to follow any given act to all its consequences would be endless, and impracticable as well; and a judgment which should fix upon a wrongdoer responsibility for all the remote and indirect results of his delinquency would be largely disproportionate to the injury which could fairly and reasonably be attributed to his fault. *E converso,* when an instance of injurious mischief has occurred, it would be a hopeless and unprofitable undertaking to trace the cause of the damage back through all the successive events of which the final fact is the result, since for every occurrence in nature the chain of causation in infinite.

The law, therefore, is obliged to adopt some limit in fixing the responsibility and defining the liability for tortious acts. The rule applicable to this subject is expressed in the maxim, *Causa proxima, non remota, in jure spectatur.* Or, as the principle is paraphrased by Lord Bacon:

"It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree": Bacon, Maxims of the Law, Reg. 1.

The application of this principle depends so much upon the character of the particular facts upon which it operates that the nature and practical working of the rule may be best apprehended by study of the cases which exemplify it. Some general considerations, relative to the meaning of the maxim and the manner in which it is used, may, however, be formulated.

I. Where an event is directly caused by an immediately antecedent fact, which is in itself adequate to account for the ultimate event, such last preceding antecedent fact will be taken as the proximate cause, although it be possible to discern that the immediate fact is itself produced or made possible by some more remote cause. As where suicide was caused by insanity, which was traceable to an injury received some months before:

Scheffer vs. Railroad Co., *infra,* p. 64.

And where goods delayed in transit by the negligence of the carrier were damaged by a flood:

Railroad Co. vs. Reeves, *infra,* p. 65.

II. The proximate cause of a fact is not necessarily or always the immediate influence by which that fact is occasioned. When a body is drawn by a chain, it is not the link next to the body that exerts the draught, but the force which operates upon the link at the other end of the chain. So, if there is apparent an unbroken sequence of causative forces by which a certain fact is produced as the recognizable result of the original force, the first influence in the series is regarded as the proximate cause of the fact:

Insurance Co. vs. Tweed, *infra,* p. 62;
Rwy. Co. vs. Kellogg, *infra,* p. 67;
Scott vs. Shepherd, 2 W. Bl. 892; 1 Sm. L. C. 449.

So where, in the course of a battle, property was fired to prevent its falling into the hands of the enemy, the destruction was held to be proximately due to the military operations and not to the fire; and the court said:

"The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim *causa proxima, non remota, spectatur.* The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior and controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster": Insurance Co. vs. Boon. 95 U. S. 117.

The intervention of some other agency, which is independent of the original wrongful act and would be, without reference to that act, sufficient to cause the mischief, breaks the sequence of causation attributable to the original act, and exonerates the wrongdoer from liability for the mischief ultimately occurring. Thus, where the defendant sold gunpowder to a child, whose parents took charge of the article, but afterwards gave some of it to the child, whereby the latter was injured, defendant was held not responsible for the sale, which, though the ultimate

cause of the accident, became actually injurious only by the intervening act of the parents:

Carter vs. Towne, 103 Mass. 507.

But, if the intervening agency is one which might reasonably have been expected, and some kind of mischief was probable by reason of such intervention, the original wrongdoer is liable for the act upon which the later agency operated:

Illidge vs. Goodwin, *infra,* p. 62;
Dixon vs. Bell, *infra,* p. 527.

III. An act is the proximate cause of such consequences as are, in the usual and natural course of events, the probable results of that act. The doer of an act is responsible, therefore, for the consequent damage which might reasonably be expected to ensue from what he does, but not for damage which happens as the result of his conduct from extraordinary conditions unknown to him.

Hadley vs. Baxendale, 9 Exchequer, 341 [1854], though a case in contract, is useful to be considered with reference to this point. The plaintiffs operated a large mill; a shaft upon which their whole machinery was dependent was broken, and the mill was obliged to stop until the shaft could be repaired; the defendants were carriers, and to them the plaintiffs delivered the broken shaft for transmission to a distant machine-shop, but the defendants were not informed of the unusual importance of the shaft, or that the mill must remain idle until the shaft should be returned; there was a delay of several days, due to the negligence of the defendants, in the carriage of the shaft; and the plaintiffs claimed as damages the loss of the profits which they would have made, during that period of idleness. It was held that, if the defendants had been made aware that the mill was wholly dependent upon the shaft, and that a loss of profits would result from their delay, they would have been liable to the extent claimed; but that, as the defendants had no such knowledge, they were liable only for such damages as would, ordinarily and in the general run of like cases, result from the negligence of which they were guilty.

To like effect are:

Sharp vs. Powell, *infra,* p. 75;
Horne vs. Railway Co., L. R. 7 C. P. 583;
Corry vs. Ironworks Co., L. R. 3 Q. B. 181.

It is not necessary, however, to the liability of one doing a tortious act that he should actually have foreseen that ill consequences would flow therefrom; and it is still less necessary that the precise result which is actually caused should have been foreseen, or even capable of being foreseen. The wrongdoer is responsible if *some* damage might reasonably have been expected, and if the damage actually ensuing be of such nature as might have been expected. As where the defendant ascended in a balloon, and, being unable to choose his place of descent, alighted in the plaintiff's garden, with the result that the plaintiff's vegetables were destroyed by the concourse of people attracted to the place:

Guille vs. Swan, 4 Denio, 464.

So are:

Illidge vs. Goodwin, *infra,* p. 62;
Hayes vs. Railroad Co., *infra,* p. 69;
Railway Co. vs. Kemp, *infra,* p. 71.

Illidge vs. Goodwin, 5 C. & P. 190. Nisi Prius (1831).

The defendant left his horse and cart unfastened and unattended in the street before the plaintiff's china-shop. A passer-by struck the horse a slight blow, whereupon the horse backed the cart against the plaintiff's window, to the destruction of the pane and of a quantity of china. *Held,* that the defendant was liable for the damage done.

TINDAL, C. J.: If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done.

Vandenburgh vs. Truax, 4 Denio, 464. New York (1847).

Vandenburgh, a merchant, had in his employ a young colored boy, who on one occasion became involved in an altercation with Truax. The latter took up a pick-ax, with which he threatened to strike the boy, who ran into the plaintiff's store. Truax, with the pick-ax in his hand, pursued the boy into the store. The fugitive, in his endeavor to escape, ran against a barrel containing wine, whereby the faucet was knocked out

of the barrel and the wine caused to flow out. *Held,* that Truax was liable for the wine that was lost.

Insurance Co. vs. Tweed, 7 Wall. 44. Supreme Court of the United States (1868).

This was an action upon a policy of insurance by which the defendant company had insured Tweed against loss by fire on a quantity of cotton belonging to him and stored in a building in Mobile called the Alabama warehouse.

By the terms of the policy the company was not to be liable for any loss due to fire which might happen or take place "by means of any invasion, riot, . . . explosion, earthquake or hurricane." The Alabama warehouse stood at the corner of two streets, one of which was south, and the other west, of the building. On the opposite side of the street, south of the warehouse was another warehouse, called the Marshall; and on the opposite side of the street west of the Alabama warehouse was the Eagle mill. An explosion took place in the Marshall warehouse, whereby that building was set on fire and destroyed. The wind blowing toward the northwest, the flames were carried diagonally across the street to the Eagle mill, which was set on fire; and from the mill the conflagration extended eastwardly, and across the intervening street, to the Alabama warehouse, which, with Tweed's cotton stored therein, was totally destroyed.

The trial court was of opinion that the direct cause of the burning of the Alabama warehouse was the fire in the Eagle mill, and that the loss was only indirectly and remotely attributable to the explosion in the other warehouse by which the original fire was caused. But the Supreme Court held to the contrary, and the judgment obtained by Tweed was reversed.

MILLER, J.: One of the most valuable of the *criteria* furnished us by these authorities [those cited in argument] is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote. In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact, that it was carried to the cotton

by first burning another building, supplies no new force or power which caused the burning. Nor can the accidental circumstance, that the wind was blowing in a direction to favor the progress of the fire toward the warehouse, be considered a new cause. That may have been the usual course of the breeze in that neighborhood. Its force may have been trifling. Its influence in producing the fire in the Alabama warehouse was too slight to be substituted for the explosion as the cause of the fire.*

Scheffer vs. Railroad Company, 105 U. S. 249 (1881).

The action was brought against a railway company by the executors of Charles Scheffer to recover damages for the death of the said Scheffer, which was alleged to have been caused by the negligent management of one of the company's trains on which the deceased was a passenger. The declaration showed that the said train was wrecked by a collision with another train of the company, which collision occurred on December 7, 1874. It was then alleged that in this disaster Scheffer sustained severe injuries about the head, face, neck and spine, "and by reason thereof the said Charles Scheffer became and was sick and sore, lame and disordered in mind and body, and in his brain and spine; and by means whereof phantasms, illusions and forebodings of unendurable evils to come upon him . . . were produced upon the brain and mind of him . . . ; which disease, so produced as aforesaid, baffled all medical skill, and continued constantly to disturb, harass, annoy and prostrate the nervous system of him, the said Charles Scheffer, to wit, from the seventh day of December, A. D. 1874, to the eighth day of August, 1875, when said phantasms, illusions and forebodings produced as aforesaid, overcame and prostrated all his reasoning powers, and induced him . . . to take his life in an effort to avoid the said phantasms, illusions and forebodings, which he then and there did; whereby and by means of the careless, unskillful and negligent acts of the said defendant aforesaid, the said Charles Scheffer, to wit, on the eighth day of August, 1875, lost his life and died."

A demurrer to this declaration was sustained, and judgment was rendered for the defendant, on the ground that the relation of the company's negligence as a cause of death was too remote to justify recovery, the proximate cause being the suicide of the defendant, his death by his own immediate act. The court cited and commented upon the cases of Insurance Co. vs. Tweed, *supra*, and Rwy. Co. vs. Kellogg, *infra*, and held that the principles stated in those cases precluded recovery in the present case.

MILLER, J.: Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of Scheffer was his own act of self-destruction. It was, within the rule

*"This [the Tweed] case went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the Alabama warehouse; but it rested on the ground that no other proximate cause was found": Miller, J., in Scheffer vs. Railroad Co., 105 U. S. 249.

in both these cases, a new cause, and a sufficient, cause of death. The argument is not sound which seeks to trace this immediate cause of death, through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment, to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that "great first cause least understood," in which the train of all causation ends.

The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train. This insanity, as a cause of his final destruction, was as little the natural or probable result of the negligence of the railway officials as his suicide; and each of these are causal or unexpected causes, intervening between the act that injured him and his death.

Railroad Company vs. Reeves, 10 Wall. 176. Supreme Court of the United States (1869).

Reeves shipped a quantity of tobacco from Salisbury, North Carolina, to Memphis, Tennessee. The shipment reached Chattanooga, where it was, on March 5, 1867, delivered by the initial carrier to the Memphis & Charleston Railroad Company for further transportation. The agent of the latter company loaded the tobacco into the company's cars on the afternoon of the 5th, and assured the representatives of Reeves that the cars should go forward at six o'clock in the evening of that day. For some reason the cars were not sent out at that time, and not until about six on the next morning. The train taking the tobacco of Chattanooga on the 6th found the track a short distance from the town obstructed by some rocks which had fallen during the night, wherefore the train was obliged to return to Chattanooga, where the tobacco was left in the cars standing in the station. On the 5th there had been heavy rains for several weeks and the Tennessee River was very high and rising rapidly. In 1826, and again in 1847, when had occurred the highest freshets in the history of the town, the water had not reached within three feet of the level of the track at the station. On this occasion, however, the river attained the previous highwater mark, on the evening of the 7th, reached the fire-boxes of the engines at the station on the afternoon of the

8th, and was ten feet higher on the evening of the 8th, the last level submerging the cars containing Reeves' tobacco. Until the night of the 7th, there had been no apprehension that the town was in danger; but, during that night merchants began to remove their goods. Afterwards the greater part of the city was flooded, the people fled to the hills, and there was a very great destruction of property. The railroad company might, before the water became too high, have sent its cars out by other lines than that which was obstructed; but there were objections of various kinds to using those lines.

Reeves sued the Memphis & Charleston Company for the damage done by the flood to his tobacco, and in the trial court was allowed to recover a judgment, that court holding that the flood was not an act of God in such sense as to exonerate the carrier, but that the proximate cause of the injury was the company's negligence in not getting the tobacco away from the town before the water made that impossible. This judgment was reversed by the appellate court, in which, with reference to the ruling of the court below, it was said by

MILLER, J.: In contrast with the stringent ruling here stated, and as expressive of our view of the law on this point, we cite two decisions by courts of the first respectability in this country.

In Morrison vs. Davis & Co., 20 Pa. St. 171, goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by the defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay caused by the lame horse the remote cause, and that the maxim, *causa proxima, non remota, spectatur*, applied as well to contracts of common carriers as to others. The court further held that, when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill and foresight, which it defines to be the common prudence which men of business and heads of families exhibit in matters that are interesting to them.

In Denny vs. New York Central Railroad Company, 13 Gray, 481, the defendants were guilty of a negligent delay of six days in transporting wool from Suspension Bridge to Albany; and, while in their depot at the latter place a few days after, it was submerged by a sudden and violent flood in the Hudson River. The court says that the flood was the proximate cause of the injury, and the delay in transportation the remote one; that the doctrine we have just stated governs the liabilities of common carriers as it does other occupations

and pursuits, and it cites with approval the case of Morrison vs. Davis & Co.

Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case.

Railway Co. vs. Kellogg, 94 U. S. 469 (1876).

The railway company operated a steam ferry-boat on the Mississippi, and owned an elevator on the western bank of the river. The plaintiff was in possession of a saw-mill and a quantity of lumber on the same bank and situate from three to five hundred feet from the elevator. Through the negligence of the company's servants in charge of the boat, the elevator was set on fire; and the fire spread to the mill and the lumber, which were destroyed. In an action brought on this account by the plaintiff, the defendant company contended that the proximate cause of the damage to the mill and the lumber was the burning of the elevator and not the negligence in the management of the boat, and that the burning of the plaintiff's property was too remote from the negligence to afford a ground of recovery. The trial court declined to accede to this proposition, and left it to the jury to say whether the burning of the mill and the lumber was the result naturally and reasonably to be expected from the burning of the elevator. The jury found in the affirmative and returned a verdict for the plaintiff.

Held, that the action of the trial court was correct, and that the plaintiff was entitled to his judgment.

STRONG, J.: The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied at the other end, that force being the proximate cause of the movement; or, as in the oft cited case of the squib in the market place; Scott vs. Shepherd, 2 W. Bl. 892. The question always is, was there such an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * *

We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be charged to the misfeasance or non-feasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In

such a case the resort of the sufferer must be to the originator of the intermediate cause. But, when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events, an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding; and it is the province of the jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time.*

Philadelphia, Wilmington and Baltimore Railroad Company vs. Constable, 39 Md. 149 (1873).

The road of the railway crossed the land of Constable. A passing train threw sparks upon the land of another person, a hundred and fifty yards down the line, and started a fire which spread to the Constable farm and destroyed fences, trees and other property thereon. This action was brought to recover damages for the Constable property. The defence was that, as the primary result of the company's negligence was the fire on the property adjoining that of the plaintiff, and that the damage to the plaintiff resulted only indirectly and remotely from the original fire, the defendant's act could not be deemed the proximate cause of the plaintiff's loss.

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*The court adverted to cases in New York and Pennsylvania which were supposed to establish a contrary rule; Ryan vs. R. R. Co., 35 N. Y. 210; Kerr vs. R. R. Co., 62 Pa. St. 353; and said:

"Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that, when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second house has no recourse to the negligent wrongdoer, they have not been accepted as authority for such a doctrine, even in the States where the decisions were made; Webb vs. R. R. Co., 49 N. Y. 420; R. R. Co. vs. Hope, 80 Pa. St. 373. And certainly they are in conflict with numerous other decided cases."

Held, that, as the fire had spread without any intervening cause from the point of its origin, the starting of the fire was the proximate cause of the damage done to the plaintiff.

MILLER, J.: * * * The fact that the fire here was communicated first to the broom-sedge and dry grass on the land of the adjacent proprietor, and spread thence in the manner stated, over his lot to the adjoining field and land of the plaintiffs, makes no difference in the application of the principles adopted in that case. The responsibility for injuries resulting from such fires is not confined by law or by the provisions of the Code to cases where the proprietors of lands which lie immediately adjacent to the railroad track suffer. Adjacent ownership has nothing to do with the question, for it can neither extend nor limit the defendant's responsibility. * * * The fire destroyed and injured the plaintiff's property in its natural and direct course, and by naturally and gradually spreading from the place where it commenced, without any intervening force or power to stand as the cause of the misfortune, and the injury suffered was, therefore, its proximate effect.

Hayes vs. Michigan Central Railroad Company, 111 U. S. 228 (1884).

The defendant company ran its trains into Chicago by a road built quite close to the shore of Lake Michigan. West of the tracks was an open space, extending 280 feet in width to Michigan Avenue, and used as a public park. In the ordinance granting the company the right to build its road at this place, the city had stipulated that a fence should be built and maintained on the western side of the line. The fence had been erected, but, at the time of the accident now to be stated, a portion of it had been broken down, leaving free access from the park to the company's tracks. The plaintiff was a boy between eight and nine years of age, bright and well grown, though deaf and dumb. Being in the park when a freight train was passing, his attention was attracted by a colored boy who was riding on a ladder attached to one of the moving cars, and who was motioning as if he desired the plaintiff to come to him. The Hayes boy started to run beside the train, slipped and fell beneath the car, and was permanently injured.

At the trial, upon the evidence of these facts, the court directed the jury to return a verdict for the defendant, holding that there was no proof of negligence on the part of the company. The judgment thereupon entered was reversed by the

Supreme Court, which held that the omission to repair the fence was a breach of duty, and that it should have been left to the jury to determine whether that omission was reasonably connected with the accident as a cause thereof. In neither court did the company rely upon any contributory negligence on the part of the plaintiff, who seems to have been regarded as too young to be held responsible for his incautious conduct.

MATTHEWS, J.: It is further argued that the direction of the court below was right, because the want of a fence could not reasonably be alleged as the cause of the injury. In the sense of an efficient cause, *causa causans*, this is no doubt strictly true; but that is not the sense in which the law uses the term in this connection. The question is, was it *causa sine qua non*, a cause which if it had not existed, the injury would not have taken place, an occasional cause? and that is a question of fact, unless the causal connection is evidently not proximate; Milwaukee and St. Paul Railroad Company vs. Kellogg, 94 U. S. 469. The rule laid down by WILLES, J., in Daniel vs. Metropolitan Railway Company, L. R. 3 C. P. 216, 222, and approved by the Exchequer Chamber, L. R. 3 C. P. 591, and by the House of Lords, L. R. 5 H. L. 45, was this: "It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendant might and ought to have resorted to." And in the case of Williams vs. Great Western Railway Company, L. R. 9 Exchequer, 157, where that rule was applied to a case similar to the present, it was said (p. 162): "There are many supposable circumstances under which the accident may have happened, and which would connect the accident with the neglect. If the child was merely wandering about and he had met with a stile, he would probably have been turned back; and one, at least, of the objects for which a stile or gate is required, is to warn people of what is before them, and to make them pause before reaching a dangerous place like a railroad."

The evidence of the circumstances showing negligence on the part of the defendant, which may have been the legal cause of the injury, according to the rule established in Railroad Company vs. Stout, 17 Wall. 657, and Randall vs. B. & O. Railroad Company, 109 U. S. 478, should have been submitted to the jury.

Williams vs. Railway Co., L. R. 9 Exch. 157 (1874).

In this case there were on the line of the defendant company two crossings, near each other, the railway intersecting a carriage road at one point and a footpath, which branched off from the road, at another point. The company was required by law to have a watchman at the road crossing and a gate or a stile at the footpath; but it had none of these. The plaintiff, a boy four and a half years old, was found lying

on the rails near the footpath, with one foot severed from his body. There was no evidence to show how he had gotten to that place, except that he had, a few minutes before, been sent on an errand from his home, which was about three hundred yards distant from the railway; but whether he had gone by way of the road and from it strayed down the line, or had gone along the path until he reached the track, could only be conjectured. It was held that the jury should be permitted to say whether the accident was caused by the company's omission to establish a gate or a stile at the crossing of the footpath.

Baltimore City Passenger Railway Company vs. Kemp, 61 Md. 74 (1884).

Mrs. Kemp, being a passenger upon a car of the railway company, in alighting therefrom was injured through the negligent management of the car, and sustained a bruise upon one of her breasts. Shortly thereafter a cancer developed from the bruise. In this action brought by her on account of the occurrence stated, it was shown that, before the accident, the plaintiff's health had been good and there had been no evidence of cancer in her person, and medical testimony was adduced to the effect that such an injury as that received by Mrs. Kemp was sufficient to cause a cancer. On behalf of the defendant it was contended that this proof was not legally sufficient to establish the accident as the cause of the cancer; and that, even if the cancer could be traced to the bruise as its immediate cause, the bruise would not have developed as it did unless there had been an existing predisposition to cancer. On these accounts it was argued that the accident could not be regarded as the proximate cause of the cancer, and that no damages could properly be allowed for that disorder.

Held, that the supposed predisposition of the patient to cancer was not a reason for denying her damages on account of a cancer actually superinduced by the defendant's negligence; and that the evidence was sufficient to warrant the jury in finding that the cancer was caused by the bruise.

ALVEY, C. J.: The second prayer offered by the defendants, and which was refused by the court, asked that the jury be instructed that there was *no legally sufficient evidence* that the cancer, testified to by the witnesses, *was caused* by the negligence of the defendants, and therefore they should not take the cancer into consideration in esti-

mating any damages that they might award to the female plaintiff. And upon this prayer for instruction, the defendants contend, 1st, that there was no evidence, *legally sufficient* to be considered by the jury, that the cancer of which Mrs. Kemp suffered was the natural result or consequence of the negligence complained of; and 2ndly, that if there was in fact, any causal connection between the immediate injury received by Mrs. Kemp and the subsequent development of the cancer, the latter, to be treated as a legal effect, was too obscure, and too remote from the alleged cause, to form an element of danger for the original wrongful act.

We shall not recite in detail all the evidence upon the subject. Suffice it to state, that the evidence shows clearly and without contradiction, that Mrs. Kemp was, at the time of the accident, and for many years prior thereto, apparently in good health and condition. The accident occurred about the middle of May, 1880, and a very short time thereafter the cancer commenced its development on the injured part of her person. * * * And the professional witnesses, while they all testify that it is impossible to know and be certain as to the origin of cancer in any given case, yet they all agree in saying that the blow, such as that described by Mrs. Kemp, was sufficient and may have been the cause of the development of the cancer in her case. In the opinion of two of the physicians, the blow on the breast, as described by Mrs. Kemp, was not only sufficient cause for the production of the cancer, but that they would attribute the cancer to that cause. And from the coincidences of the case we must say that their opinion does not appear to be unreasonable.

Now, with this evidence in the case, unless the court could have been required to hold, as matter of law, that the production of cancer was too uncertain and too remote a consequence of the alleged injury to be allowed to be considered in estimating the damages, upon what principle could the court properly withhold the matter from the jury, upon the prayer offered by the defendants? It was for the jury to determine, as matter of fact, whether the cancer did result from the injury received. And in determining this question they were required to consider all the circumstances and coincidences of the case, in connection with the testimony given by the professional witnesses. If therefore the subject was proper to be considered by the jury at all, we are clearly of opinion that there was evidence sufficient to be considered by them. * * *

It is not simply because the relation of cause and effect may be somewhat involved in obscurity, and therefore difficult to trace, that the principle obtains, that only the natural and proximate results of a wrongful act are to be regarded. It is only where there may be a more direct and immediate sufficient cause of the effect complained of, that the more remote cause will not be charged with the effect. If a given result can be directly traced to a particular cause, as the natural and proximate effect, why should not such effect be regarded by the law, even though such cause may not always, and under all conditions of things, produce like results. It is the common observation of all, that

the effect of personal injuries depend much upon the peculiar conditions and tendencies of the persons injured; and what may produce but slight and comparatively uninjurious consequences in one case, may produce consequences of the most serious and distressing character in another. And this being so, a wrongdoer is not permitted to relieve himself from responsibility for the consequences of his act, by showing that the injury would have been of less severity if it had been inflicted upon anyone else of a large majority of the human family. Hence the general rule is, that, in actions of tort like the present, the wrongdoer is liable for all the direct injury resulting from his wrongful act, and that, too, although the extent or special nature of the resulting injury could not, with certainty, have been foreseen or contemplated as the probable result of the act done. * * * If by the blow received a severe contusion had been produced, resulting in an ordinary tumor or open ulcer, we suppose no question would have been raised as to the right of the plaintiff to show such results of the injury received, as indicating the extent of the injury and the degree of suffering endured. Why should a different rule be applied in this case? That the female plaintiff may have had a tendency or predisposition to cancer, can afford no proper ground of objection. She in common with all other people of the community had a right to travel or be carried in the cars of the defendants, and she had a right to enjoy that privilege without incurring the peril of receiving a wrongful injury that might result in inflaming and developing the dormant germs of a fatal disease. It is not for the defendants to say that, because they did not, or could not in fact, anticipate such a result of their negligent act, they must therefore be exonerated from liability for such consequences as ensued.

Texas and Pacific Railway vs. Howell, 224 U. S. 577, Supreme Court of the United States (1911).

Howell, who was in the employ of the railway company, was set to digging a hole under a coal-chute upon which other men were working. By the negligence of the men above, a piece of timber was allowed to fall upon Howell, whereby he was injured. A few months afterward Howell developed tuberculosis of the spine, or Potts' disease. He sued the company for the injury sustained by him. The defendant asked the court to instruct the jury that the disease of the spine was too remote from the blow to be attributed to it as a result. The court left it to he jury to determine whether the disease was the direct consequence of the blow. The jury found in the affirmative and allowed damages to compensate for the tuberculosis. *Held*, that the action of the trial court was correct.

HOLMES, J.: There was ample evidence that the blow occasioned the development of his disease, although it was not discovered to be Potts' disease, as it is called, for over a year. But it is argued that, if such a disease is due to the presence of tubercular germs in a man's system before the accident, the defendant ought not to be required to pay more

than it would to a normal man. On this point also we are of opinion that the jury were warranted in finding that the disease was the direct result of the injury.

Green vs. Shoemaker & Co., 111 Md. 69 (1909).

The defendants were contractors engaged in work upon the roadbed of a railroad. The work required heavy blasting which shook the surrounding earth for a distance of several hundred yards and hurled large fragments of rock in all directions.

Mrs. Green had rented three rooms in a house situated two hundred yards from the site of the work. She had entire control over these rooms in which she lived. The work continued night and day over a period of about nine months. During this time the house was almost demolished by the vibrations and was struck and penetrated many times by large pieces of stone. In dread for their lives, the inmates often sought shelter in the cellar and, though the plaintiff was never actually struck, she fell into a state of nervous prostration.

It was contended by the defendants that, as there had been no physical impact or bodily injury to the plaintiff, they were not liable to her for injuries resulting from mere fright or nervousness.

Held, that as great fright was the reasonable and natural consequence of the circumstances which the defendant had created, and as the injury to her health was actually and proximately caused by that fright, the defendant was liable.

PEARCE, J.: * * * We are of the opinion that under the evidence, the plaintiff was not a mere lodger, the landlady retaining the legal possession of the whole house, but that she was a tenant entitled to the exclusive possession and control of the rooms she occupied. Blasting of rocks by the use of gunpowder or other explosives in the vicinity of another's dwelling house, is a nuisance, and the person doing the act, or causing it to be done, is liable for all injuries that result therefrom. * * * In Webb's Pollock on Torts, the author says: "The conception of private nuisance was formerly limited to injuries done to a man's freehold by a neighbor's acts, of which stopping or narrowing rights of way and flooding land by the diversion of water courses appear to have been the chief species. In the modern authorities it includes all injuries to an owner or occupier in the enjoyment of the property of which he is in possession, without regard to the quality of the tenure." * * * "The kind of nuisance which is most commonly spoken of by the technical name, is the continuous doing of something which interferes with another's health or comfort, *in the occupation of his property*, such as carrying on a noisy or offensive trade." * * * There is a wide divergence of judicial opinion as to whether a cause of action will lie for actual physical injuries resulting from fright and nervous shock caused by the wrongful acts of another; and it may be considered as settled, that *mere fright, without any physical injury resulting therefrom*, cannot form the basis of a cause of action. This is so, because mere fright

is easily simulated, and because there is no practical standard for measuring the suffering occasioned thereby, or of testing the truth of the claims of the person as to the results of the fright. But when it is shown that a *material physical injury* has resulted from fright caused by a wrongful act, and especially, as in this case, from a constant repetition of wrongful acts, in their nature calculated to cause constant alarm and terror, it is difficult, if not impossible, to perceive any sound reason for denying a right of action in law, for such physical injury. * * * In Railway Co. vs. Kemp, 61 Md. 80, JUDGE ALVEY said: "It is not simply because the relation of cause and effect may be somewhat involved in obscurity, and therefore difficult to trace, that the principle obtains that only the natural and *proximate* results of a wrongful act are to be regarded. *It is only where there may be a more direct and immediate sufficient cause of the effect complained of, that the more remote cause will not be charged with the effect.* If a given effect can be traced directly to a particular cause, as the natural and proximate effect, why should not such effect be regarded by the law, even though such cause may not always, and under all conditions of things, produce like results. * * * Hence, the general rule is, in actions of tort like the present, that the wrongdoer is liable for all the direct injury resulting from his wrongful act, and that too, although the extent or special nature of the resulting injury could not, with certainty, have been foreseen or contemplated as the probable result of the act done." * * * It must be conceded that the numerical weight of authority supports the general rule that there can be no recovery for nervous affections unaccompanied by contemporaneous physical injury; but the sounder view, in our opinion, is, that there are exceptions to this rule, and that where the wrongful act complained of is the proximate cause of the injury, within the principles announced in the Kemp case, and where the injury, in the light of all the circumstances, to have been contemplated as a natural and probable consequence thereof, the case falls within the exception and should be left to the jury. In Bell vs. Great Northern R. R., Irish L. R. 26 Eq. 428, the Court said . . . that where no intervening independent cause of the injury was suggested, and where the jury could find that the bodily injury complained of was a natural consequence of the fright, the chain of reasoning for recovery was complete.

Sharp vs. Powell, L. R. 7, C. P. 258. Common Pleas (1872).

The defendant's van was washed by his servant in a public street, such use of the street being prohibited by law. The water used flowed into a gutter at the side of the street and toward a sink about twenty-five yards from the place where the van was washed. This sink was guarded by a grating, through which, in ordinary circumstances, the water would have fallen into the sink, such being what the defendant's servant expected.

On this occasion, however, the weather being exceptionally cold, the grating was frozen over, in consequence of which fact the water flowing down the gutter spread out over the roadway and quickly formed a sheet of ice. A horse belonging to the plaintiff, in passing through the street, slipped upon the ice produced by the water from the van, and broke his leg so that it became necessary to kill him. The defendant's servant had not observed that the water which he sent down the gutter did not fall into the sink. The plaintiff brought this action to recover the value of his horse which had been lost through the negligence of the defendant's servant.

Held, that, though it was improper to wash the van in the street, that act was not the proximate cause of the injury to the plaintiff's horse, as the servant could not reasonably be expected to foresee that the consequence of his act would be the foundation of a dangerous nuisance.

BOVILL, Chief Justice: No doubt, one who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom; but, generally speaking, he is not liable for damage which is not the natural or ordinary consequence of such an act, unless it be shewn that he knows, or has reasonable means of knowing, that consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person. Where there is no reason to expect it, and no knowledge in the person doing the wrongful act that such a state of things exists to render the damage probable, if injury does result to a third person it is generally considered that the wrongful act is not the proximate cause of the injury, so as to render the wrongdoer liable to an action. In the present case, the learned Judge has reserved the power to us to draw inferences from the facts; and the proper inference to be drawn from the evidence seems to me to be that, if the drain had not been stopped, and the road had been in the proper state of repair, the water which the defendant's servant caused to flow into the gutter or channel would have passed away without doing mischief to any one. Can it, then, be said to have been the ordinary and probable consequence of the defendant's act that the water should have frozen over so large a portion as to occasion a dangerous nuisance? I think not. There was no distinct evidence to shew the cause of the stoppage of the sink or drain, or that the defendant knew it was stopped. He had a right then to expect that the water would flow down the gutter to the sewer in the ordinary course; and but for the stoppage (for which the defendant is not responsible), no damage would have been done. The conclusion, therefore, I feel compelled to come to is, that the defendant could not rea-

sonably be expected to foresee that the water would accumulate and freeze at the spot where the accident happened.

GROVE, J.: I am entirely of the same opinion. I think the act of the defendant was not the ordinary or proximate cause of the damage to the plaintiff's horse, or within the ordinary consequences which the defendant may be presumed to have contemplated, or for which he is responsible. The expression, the "natural consequences," which has been used in so many cases, and which I myself have no doubt often used, by no means conveys to the mind an adequate notion of what is meant: "probable," would perhaps be a better expression. If on the present occasion the water had been allowed to accumulate round the spot where the washing of the van took place, and had there frozen obviously within the sight of the defendant, and the plaintiff's horse had fallen there, I should have been inclined to think that the defendant would have been responsible for the consequences which had resulted. But there must be some limit to the liability of a man for the consequences of a wrongful act; and it does not by any means follow that, though the act of allowing the water to flow over the street in the first instance was wrongful, the defendant is liable for a stoppage occurring after the water had got back into its proper and accustomed channel.

ASSAULT AND BATTERY.

An assault is an attempted or inchoate battery. A battery is a consummated assault.

"Assault is generally coupled with battery, and for the excellent practical reason that they generally go together; but the assault is rather the initiation or offer to commit the act of which the battery is the consummation. An assault is included in every battery": 1 Hawkins, Pleas of the Crown, c. 62.

The essential element of an assault is that it violates, not the right to be safe, but the right to be secure (*sine cura*), security and safety being distinct things. Hence an assault is committed if the assailant has the apparent power of doing harm, though he may in fact not be at all dangerous, as where he presents an unloaded firearm. So, if the person ineffectually assailed is not aware of his danger, as where the attempt to do violence is made behind his back or in the dark, he cannot recover for an assault, since he was not rendered insecure, although the assailant in such a case is probably liable criminally for the misdemeanor of assault—the cases respecting this distinction not being entirely in agreement.

Assault and battery, or acts which without lawful excuse would be such, may be justified by showing them done in the necessary defence, by one first assailed, of his person or property. A plea setting up this excuse is called a plea of *son assault demesne*. The exercise of force which is sought to be thus justified must be shown, in the evidence, to have been proportioned to the violence which it was necessary to repel: as Lord Holt expressed it, for every assault it is not reasonable that a man should be banged with a cudgel:

Cockcroft vs. Smith, *infra*, p. 84.

Excessive violence used in self-defence is assault and battery for which the first assailant may recover damages:

Gaither vs. Blowers, 11 Md. 537;
Railroad Co. vs. Larkin, 47 Md. 155.

Tombs vs. Painter, 13 East, 1. King's Bench (1810).

Action on a bond by which the defendant obligated himself not to assault, molest or injure the person of the plaintiff in anywise howsoever. The plaintiff alleged that the defendant had assaulted, molested and injured the person of the plaintiff by beating, bruising, wounding and otherwise ill-treating him. This the defendant denied. At the trial it appeared that "the parties being in the same public house, in different parts of the room, the defendant jumped up from his seat, with his fist clenched, as if to strike the plaintiff, but was pulled back to his seat by another person, and did not get within reach of the plaintiff; but he abused him, swore at him, and drank the beer out of his cup."

Verdict and judgment for the plaintiff. The trial judge thought that the defendant's conduct amounted to an ill-treating of the plaintiff; and all the court held that there was an assault.

LORD ELLENBOROUGH, C. J.: The clenching his fist at the plaintiff was an assault, and an act of personal offence.

Patterson vs. Pillans, 43 App. D. C. 505 (1915).

VAN ORSDEL, J.: This is an action in trespass on the case for damages for an alleged assault. The appeal is from the judgment of the court below on demurrer to plaintiff's declaration.

It is alleged that plaintiff, Ella C. Patterson, was traveling with defendant, Helen M. Pillans, as a companion; that, while stopping in an apartment house in this city, plaintiff, on returning from church on the evening of May 3, 1914, found the apartment locked; that after ringing the bell and rapping on the door for about an hour, and failing to get any response from defendant, she appealed to the clerk, who telephoned to defendant, and securing permission for plaintiff to enter the apartment for the night; that the following morning she arose at about her usual hour and found she was locked in and the key was taken from the door, and she had no means of access to the telephone; that she waited patiently, however, for defendant to bestir herself, and when she did plaintiff asked her why she had locked the door, and defendant replied that she had locked it because she wished to, and would give plaintiff no other reason for so doing; that plaintiff thereupon requested that the door be unlocked in order to allow her to go downstairs to breakfast, which requested was not granted for some time thereafter, when, finally yielding to plaintiff's insistence, defendant unlocked the door, and plaintiff was permitted to leave the apartment.

Upon these allegations, unaccompanied by any threats whatever, it is sought to sustain a charge of assault. In Hays vs. People, 1 Hill, 351, the following comprehensive definition of assault was given, which has been approved in many cases: "An assault is defined by these authorities, to be an attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person."

Tested by this rule, there was no assault committed. Before the charge of assault can be sustained, it must appear that the defendant threatened plaintiff with violence, coupled with the intent, and, at least, apparent means of carrying the threat into execution. The mere locking or obstruction of a door is not an assault. In Innes vs. Wylie, 1 Car. & K. 257, plaintiff had been wrongfully expelled from a certain society, and the privilege of attending its meetings denied. He attempted to force his way into one of the meetings, but his way was obstructed by a policeman. On this point the policeman testified: "The plaintiff tried to push by me into the room, and I prevented him." On this question the court instructed the jury as follows: "You will say whether, on the evidence, you think that the policeman committed an assault on the plaintiff, or was merely passive. If the policeman was entirely passive, like a door or a wall put to prevent the plaintiff from entering the room, and simply obstructing the entrance of the plaintiff, no assault has been committed on the plaintiff, and your verdict will be for the defendant. The question is, Did the policeman take any active measures to prevent the plaintiff from entering the room, or did he stand in the doorway, and not move at all?"

Neither will the allegation that the acts charged so distressed and humiliated plaintiff as to "cause her intense mortification and anguish of mind and body, so that she became excited and nervous and unable to sleep, and has suffered severe and lasting headaches therefrom," support the charge of assault. In the case of Braun vs. Craven, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15, defendant went to the house of plaintiff, his tenant, to collect rent, and found plaintiff moving her effects from the premises. He attempted to prevent the removal of plaintiff by using threatening and abusive language, but made no attempt to use personal violence to plaintiff. "Under the pleadings in this case mere words and gestures are sought to be made actionable because of the nervous temperament of the plaintiff, without which such words and gestures would not be actionable. This would introduce and incorporate in the law a new element of damage,—a new cause of action,—by which a recovery might be had for an injury resulting to one of a peculiarly nervous temperament, while no injury would result to another in identically the same position. From such a cause of action and liability for damage a dangerous use could be made. No such recovery is authorized under the common law, and no statute gives it."

In any view of the case, the declaration fails to state a cause of action, and the demurrer was properly sustained; but it may be suggested that a distinction exists between a case where the parties have no contractual claim upon each other, and a case, like the present, where the acts alleged related to the conduct of the mistress of the house toward her maid servant. So long as the master perpetrates no bodily injury on the servant, wide latitude is extended in controlling the conduct of his servants within his own premises, and enforcing proper conduct and performance of duty on their part.

The judgment is affirmed, with costs.

Anonymous, 1 Ventris, 256. King's Bench (1674).

In an assault and battery, the case upon the evidence was this: The defendant drew a sword and waived it in a menacing manner against the plaintiff, but did not touch him, so the jury were ordered to find him guilty as to the assault, but not of the battery.

Cole vs. Turner, 6 Modern, 149. Nisi Prius (1704).

HOLT, C. J., upon evidence in trespass for assault and battery, declared:

First: That the least touching of another in anger is a battery.

Secondly: If two or more meet in a narrow passage, and, without any violence or design of harm, the one touches the other, it will be no battery.

Thirdly: If any of them use violence against the other, to force his way in a rude, inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt will be a battery.

Coward vs. Baddeley, 4 H. & N. 478. Exchequer (1859).

The defendant was a fireman, and on a certain occasion was engaged in directing a stream of water upon a burning house. The plaintiff, conceiving that the water was spreading the flames, touched the defendant for the purpose of attracting his attention and giving him advice. The latter, being annoyed, gave the plaintiff in custody to a police officer, on a charge of assault; and the officer took the plaintiff to a police station, where he was confined for several hours, and whence he was afterwards taken before a magistrate for trial.

The plaintiff brought this action for assault and battery and false imprisonment. The defendant pleaded that the plaintiff had assaulted him, wherefore he gave the plaintiff in charge to the officer. The trial judge instructed the jury that they must find for the plaintiff unless it appeared that, in laying hands on the defendant, he had done so in a hostile manner. The jury found that the plaintiff's only intention was to attract the attention of the defendant. Verdict for the plaintiff, which the court, on motion to set aside, refused to disturb.

MARTIN, B.: The assault and battery which the defendant was bound to establish means such an assault as would justify the putting in force the criminal law for the purpose of bringing the plaintiff to justice. It is necessary to show some act which justified the interference of a police officer. Touching a person, so as merely to call his attention, whether the subject of a civil action or not, is not the ground of criminal proceeding.

Hannabalson vs. Sessions, 116 Iowa, 458 (1902).

Action at law to recover damages for an alleged assault and battery. There was a verdict and judgment for defendant, and plaintiff appeals. *Affirmed.*

WEAVER, J.: Plaintiff and defendant live upon adjoining lots. There is frequent war between the families. The *casus belli* in the present instance is to be found in the following circumstances: Upon the boundary line between the lots is a tight board fence, a part of which was built by plaintiff's husband; but, unfortunately, this barrier, while all sufficient to prevent the passage of the dove of peace, is neither high enough nor tight enough to prevent the interchange of brickbats or the bandying of opproprious epithets. On May 30, 1898, the defendant while at work in his garden, claimed to have narrowly escaped a brick hurled in his direction by one of the plaintiff's children, and in his indignation at the unprovoked bombardment threatened the lad with arrest. Plaintiff and her husband, being at work nearby, heard the threat and took up the quarrel. About this time plaintiff's husband discovered that a ladder belonging to the defendant was hanging upon a peg or block attached to the partition fence, and, conceiving this to be a cloud upon his title, he forthwith attempted to remove it, while defendant, seeing the peril in which his property was placed, rushed to its defense. Whether plaintiff himself laid violent hands on the ladder is a matter of grave dispute. She denies it, and says that the height and depth of her offending consisted in her leaning up against the fence with one arm quietly hanging over the top thereof, and in stimulating her husband's zeal by audible remarks about the "crazy

fool" who was bearing down upon them from the other side. She further avers that while occupying this position of strict neutrality, the defendant assaulted her *vi et armis*, and with his clenched fist struck the arm which protruded over the fence top into his domain. Defendant denies the striking, and says that plaintiff, instead of being a peaceable and impartial observer of the skirmish, was herself a principal actor, and that in aid of her husband she climbed upon some convenient pedestal, and, hanging herself across the fence, reached down, and with malice aforethought seized the ladder and wrenched it from its resting place. Thereupon, actuated by a natural and lawful desire to protect his property from such ravishment, and being goaded on by statements from the other side of the fence reflecting upon his mother and casting doubt upon his proper rank in the animal kingdom, he gently, and without unreasonable force laid his open hand upon plaintiff's arm, and mildly but firmly suggested the propriety of her "keeping on her own side of the fence."

It is said that the court erred in instructing the jury that, if plaintiff leaned over the partition fence and attempted to interfere with the ladder, defendant had the right to use such force upon her as was reasonably necessary to cause her to desist, and to expel her from his premises. It is claimed this instruction is wrong, not only as a matter of legal principle, but because no such defense was pleaded. As to the matter of pleading, we have to say, without attempting to decide whether this defense is not available under the general denial, that the defendant did, before verdict, amend his answer and plead specifically that he was acting in justifiable defense of his property. There was no error in permitting the amendment. The general doctrine announced in the instruction is, in our judgment correct. The mere fact that the plaintiff did not step across the boundary line does not make her any less a trespasser if she reached her arm across the line as she admits she did. It is one of the oldest rules of property known to the law that the title of the owner of the soil extends, not only downward to the center of the earth, but upward *usque ad coelum*, although it is, perhaps, doubtful whether owners as quarrelsome as the parties in this case will ever enjoy the usufruct of their property in the latter direction. The maxim, "*Ubi pars est ibi est totum*"—that where the greater part is, there is the whole,—does not apply to the person of a trespasser, and the court and jury could therefore not be expected to enter into any inquiry as to the side of the boundary line upon which plaintiff preponderated, as she reached over the fence top. It was enough that she thrust her hand or arm across the boundary to technically authorize the defendant to demand that she cease the intrusion, and to justify him in using reasonable and necessary force required for the expulsion of so much of her person as he found upon his side of the line, being careful to keep within the limits of the rule, "*Molliter manus imposuit*," so far as was consistent with his own safety. Under the instructions of the court, the jury must have found that the defendant kept within the scope of his legal rights in this respect, and that the alleged assault was not established by the evidence.

The judgment of the district court is affirmed.

Cockcroft vs. Smith, 2 Salkeld, 642. King's Bench (1705).

In trespass for an assault, battery and maihem, defendant pleaded *son assault demesne*, which was admitted to be a good plea in maihem. But the question was, what assault was sufficient to maintain such a plea in maihem? HOLT, C. J., said, that Wadham Wyndham, J., would not allow it if it were an unequal return; but the practice had been otherwise, and was fit to be settled. That for every assault he did not think it reasonable a man should be banged with a cudgel; that the meaning of the plea was, that he struck in his own defence. That if A strike B, and B strikes again, and they close immediately, and in the scuffle B maihems A, that is *son assault;* but if, upon a little blow given by A to B, B gives him a blow that maihems him, that is not *son assault demesne.* POWEL, J., agreed; for the reason why *son assault* is a good plea in maihem is because it might be such an assault as endangered the defendant's life.

FALSE IMPRISONMENT.

To constitute a false imprisonment there must be a total, or substantially total, restraint upon the liberty of locomotion. A mere obstruction of a person's movements, leaving him free to go in any other direction than that obstructed, is not an imprisonment, though it may be actionable as a wrong of some other name:

Bird vs. Jones, *infra,* p. 91.

The restraint must be exercised in such circumstances that the subject is aware that he is restrained; one is not falsely imprisoned who does not know that he is restrained:

Herring vs. Boyle, *infra,* p. 92.

If, however, the intention to restrain is asserted and is manifestly possible of execution, it matters not that the subject would be unable to move if there were no restraint; as where a man confined to his bed by illness was wrongfully arrested, it was a case of false imprisonment:

Grainger vs. Hill, *infra,* p. 153.

A detention which is originally rightful may become false imprisonment by an abuse of the power to restrain which is given by law; as where a prisoner is detained for an undue period, or is treated with unnecessary rigor:

Wright vs. Court, *infra,* p. 93;
Kirk vs. Garrett, 84 Md. 383.

And an arrest originally unlawful can not be validated by warrants afterward coming into the officer's hands:

Barratt vs. Price, *infra,* p. 94.

False imprisonment may be effected by directly arresting and detaining another person, or by causing such arrest and detention to be done by some one else, as by a servant or an officer; and the wrongful result may be reached by an attempted or pretended use of legal process, as by issuing, or procuring the issue and execution of, a void or invalid warrant of arrest, or,

in some cases, by executing such a warrant. Where, however, the arrest is accomplished in accordance with the precept of a valid warrant or other process, no action lies for false imprisonment, but the remedy in such case, if there be any remedy, is by an action for malicious prosecution against the persons who wrongfully procured the issue of the process; see the cases cited below.

Imprisonment may be justified, in a proper case, either by a warrant or without warrant.

I. **Arrest by Warrant** is justified by an apparently valid writ authorizing the arrest. To be valid, the writ must issue from a court or magistrate legally authorized to issue such writs, and it must be fair on its face; that is, it must substantially conform to the legal requirements applicable to such a writ, and there must be nothing in its language or appearance to apprise the officer that the writ is not regularly and duly issued. Where a warrant of apparent validity is given to an officer, he is protected in executing it, although the writ may prove to be invalid for some reason not evident upon its face; as where a writ of attachment was issued upon an insufficient affidavit:

Matthews vs. Densmore, *infra,* p. 110.

So where the clerk of a court was authorized by law to issue warrants of commitment when so directed by the court, and in the particular case issued such a warrant without the direction of the court:

Andrews vs. Marris, *infra,* p. 111.

If, on the other hand, the writ is void, or is on its face invalid, it affords no protection to the officer executing it. Thus,

A writ may be void because it issues from a court or a magistrate having no jurisdiction in such a case as that in which it is issued; as if a court having jurisdiction only in probate matters should assume authority to arrest and commit on a charge of crime:

Bradley vs. Fisher, *infra,* p. 191.

So it has been held that, where a court-martial assumed authority to exercise discipline over a person not subject to military law, the writ issued to enforce the judgment of the court-martial was void and did not protect the officer executing it, though he had no means of knowing the infirmity of the writ:

Wise vs. Withers, *infra,* p. 279.

The application of this doctrine, made in Wise vs. Withers has, however, not been universally approved, and it has been said that the ruling in that case is not "a deliberate decision on the question":

Savacool vs. Boughton, 5 Wend. 170.

Again, a writ may be void, or so far invalid that it will not justify the officer in executing it, by reason of its apparent irregularity or of defects in its structure or wording. Thus,

A writ is irregular and invalid if, though the court has jurisdiction in the case, there is no power to proceed in the manner directed by the writ; as where a magistrate who had authority only to summon a defendant to appear issued a warrant for the arrest of the defendant; here the constable was not justified in making the arrest:

Shergold vs. Holloway, 2 Strange, 1002.

A writ may be fatally defective, and so an insufficient justification for the officer, where it fails to describe, or misdescribes, the court whence it issues:

Carratt vs. Morley, *infra,* p. 114.

Or where the language is substantially insufficient:

Lewin vs. Uzuber, *infra,* p. 126.

For the issue of a void or irregular writ, not only the clerk, but in some cases the magistrate, and even the plaintiff and his attorney, may be liable in an action for false imprisonment, though the officer executing the writ is protected if it be not obviously invalid:

Andrews vs. Marris, *infra,* p. 111;
Carratt vs. Morley, and note thereto, *infra,* p. 114;
Morgan vs. Hughes, *infra,* p. 124.

Again, the writ must be executed by arresting the person therein named. A general warrant, directing an officer to arrest persons not named, is void on its face, and a person arrested upon such a warrant may have an action:

Huckle vs. Money, *supra,* p. 49.

So, if the writ authorizes the arrest of a person of a certain name, and the officer arrests one bearing a different name, the writ is not a protection to the officer, although the person arrested may be the one intended by the author of the writ:

West vs. Cabell, *infra,* p. 107.

If, however, a person who is not named in a warrant of arrest represents himself to the officer as the person who is named, the officer is justified in arresting one so professing to be the person named; as where Sarah E. Dunston told an officer that her name was Emily M. Dunston, against whom the officer had a writ; the officer was justified in arresting the woman, though he was held liable for detaining her after her true name was made known to him:

Dunston vs. Paterson, 2 C. B. N. S. 495.

II. **Arrest Without a Warrant** may be lawfully made, and will be justified although the person arrested proves to be innocent, in certain cases by a peace officer, as a constable or a policeman, and in certain cases, not precisely identical, by an unofficial person.

A. A peace officer may arrest without warrant any person

(1) committing or about to commit a felony in the officer's presence; or

(2) committing or threatening to commit in the officer's presence a misdemeanor amounting to a breach of the peace; or

(3) on suspicion of having committed a felony where there is reasonable ground to believe that a felony has been committed and that the person arrested is guilty of such felony.

B. An unofficial person may arrest without warrant another person

(1) committing or about to commit a felony in the presence of the person arresting; or

(2) committing or threatening to commit, in the presence of the person arresting, a misdemeanor amounting to a breach of the peace; or

(3) on suspicion of having committed a felony where a felony has in fact been committed and there is reasonable ground to believe that the person arrested is guilty of such felony.

The difference is, that, in arresting on suspicion of felony, the officer is justified if there is reasonable ground to believe that somebody has committed a felony, while the unofficial person can justify only by showing that a felony has actually been committed. Although in some jurisdictions there are authorities which modify these rules in various particulars, the foregoing statement is supported by the text-writers and by the common law cases:

Baynes vs. Brewster, *infra,* p. 95;
Timothy vs. Simpson, *infra,* p. 97;
Railroad Co. vs. Cain, *infra,* p. 99;
Beckwith vs. Philby, *infra,* p. 101;
Hogg vs. Ward, *infra,* p. 102;
Allen vs. Wright, *infra,* p. 103;
Holley vs. Mix, *infra,* p. 104;
Hobbs vs. Branscomb, *infra,* p. 107;
Davis vs. United States, 16 App. D. C. 442;
Fox vs. Gaunt, 3 B. & Ad. 798;
Kirk vs. Garrett, 84 Md. 405;
Roddy vs. Finning, 43 Md. 504.

These rules, however, are to be taken subject to these qualifications:

(*a*) By statute in England and in some American States, police officers are authorized to make arrest either for all or for certain specified misdemeanors, which extends the power to cases not involving breach of the peace; and in many cities municipal ordinances enlarge the power of police officers so as to include violation of minor police regulations; and,

(*b*) While a breach of the peace is generally accepted as meaning only an actual disturbance of the peace, as by affray or other disorderly conduct, the phrase has been held, in some of its uses, broad enough to include any misdemeanor. Thus, it was once (in 1763) held that libel was not a breach of the peace:

Rex vs. Wilkes, 2 Wilson, 151.

But the words "treason, felony and breach of the peace," as used in the Federal Constitution and in some statutes, cover all crimes and misdemeanors:

Williamson vs. United States, 207 U. S. 425.
Rawlins vs. Ellis, 16 M. & W. 172.
Cecil vs. Nottingham, 12 Mod. 348.

By the common law, however, and except as warranted by statute, neither an officer nor an unofficial person is justified in arresting for a misdemeanor committed in the past and not in the presence of the person arresting; nor can an arrest without warrant be justified by showing that the person arrested was in the commission of some misdemeanor not involving an actual breach of the peace. At common law a number of grave offences were only misdemeanors, which are now, by statute in most American States, made felonies; *ex. gr.*, perjury, libel, conspiracy. Therefore, where the defendant, a police officer, arrested the plaintiff, without a warrant, upon a reasonable suspicion that he had committed perjury, the officer was held liable for false imprisonment, though it would have been otherwise had the charge amounted to felony.

Bowditch vs. Balchin, 5 Exch. 378 [1850].

The reasonable ground, or probable cause, which will justify an arrest without warrant on suspicion of felony committed is such "reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged":

Munns vs. Nemours, 3 Wash. C. C. 37.
Foshay vs. Ferguson, *infra*, p. 136;
Boyd vs. Cross, *infra*, p. 138.

In an action for false imprisonment the plaintiff is not obliged to allege or prove that the defendant acted from malice or any other evil motive; it is sufficient to prove the imprisonment. Nor can the defendant justify his act by proving his own good intentions and good faith, but must rely upon facts that warranted his action, this being one of the cases in which a man acts at his peril and must show actual justification for what he does.

What Constitutes.

Bird vs. Jones, 7 Queen's Bench, 742 (1845).

A part of Hammersmith Bridge, which is ordinarily used as a public footway, was appropriated for seats to view a regatta, and separated for that purpose from the carriage way by a temporary fence. From the dissenting opinion of LORD DENMAN, C. J., it appears that this appropriation of the bridge was unwarranted by law, and it seems to have been done by the bridge company for the purpose of making a profit for itself by "extorting money from passengers." The plaintiff, conceiving that he as a member of the public, was still entitled to use the whole of the bridge for transit, climbed over the fence, although the defendant, who was the clerk of the bridge company, endeavored to pull him back. The defendant then stationed two policemen to prevent the plaintiff from proceeding along the footway in the direction in which he wished to go; and the plaintiff was thus prevented from proceeding, although he was told that he might go back into the carriage way and proceed across the bridge if he chose. This he refused to do, and he remained where he was, inside the enclosure, for about half an hour; then he undertook to force his way forward along the footway, and in so doing assaulted the defendant, whereupon he was taken into custody.

The plaintiff brought this action upon the theory that the treatment which he had received on the bridge constituted false imprisonment. But of the four judges, three held that, since he was at liberty to return as he had come and then to go where

he would, the plaintiff had not been imprisoned. Mere obstruction does not amount to imprisonment.

COLERIDGE, J.: I am of opinion there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed; but a boundary it must have, and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom; it is one part of the definition of freedom to be able to go whithersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a power exterior to our own. [Citing a curious case on the point, that of Sir Miles Hobert and Mr. Stroud, Cro. Car. 209.]

PATTERSON, J.: I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room; and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree, also, that the compelling a man to go in a given direction against his will may amount to an imprisonment. But I cannot bring my mind to the conclusion that, if one man merely obstructs the passage of another in a particular direction, whether by threat of personal violence or otherwise, leaving him at liberty to stay where he is or to go in any other direction if he pleases, he can be said thereby to imprison him. He does him wrong, undoubtedly, if there was a right to pass in that direction, and would be liable to an action on the case for obstructing the passage, or of assault if, on the party persisting in going in that direction, he touched his person or so threatened him as to amount to an assault. But imprisonment is, as I apprehend, a total restraint of the liberty of the person, for however short a time, and not a partial obstruction of the will, whatever inconvenience it may bring on him.

Herring vs. Boyle, 1 Cr. M. & R. 377. Exchequer (1834).

The plaintiff, a boy ten years of age, was at a boarding school kept by the defendant. On the day before Christmas, the plaintiff's mother, who was a widow and the boy's guardian, requested the defendant to let the boy go home with her for the holidays. This Boyle refused to do unless Mrs. Herring would pay him twenty guineas, being the amount due on account of schooling for the quarter ending on the next day. On two other occasions within the ensuing week, the defendant refused the mother

leave to take her son home with her, and would not even permit her to see him. At the end of seventeen days after the first demand, the plaintiff was taken from the school on a writ of *habeas corpus*. Thereupon the plaintiff brought this action for false imprisonment against the schoolmaster. It did not appear that the boy knew that his mother had requested that he be sent home, and there was no evidence that he had been under any other restraint than is usual in a school.

Held, that the defendant's conduct did not amount to false imprisonment of the plaintiff.

Counsel for the plaintiff said: "It may fairly be presumed that a keeping at school during the holidays is against the will of a school boy."

BOLLAND, B.: The evidence did not bring the schoolmaster and the plaintiff in contact, so as to show there was any the least restraint of the one upon the other.

ALDERSON, B.: In the present case there was no proof that the master conducted himself to the boy in a different manner in any respect before and after the refusal to deliver him up to his mother.

GURNEY, B.: This plaintiff complains of an assault and false imprisonment. There was no evidence of any restraint upon him. There was no evidence that he had any knowledge of his mother having desired that he should be permitted to go home, nor that anything passed between the plaintiff and defendant which showed that there was any compulsion upon the boy; and there was nothing to show that he was conscious that he was in any respect restrained.

Wright vs. Court, 4 B. & C. 596. King's Bench (1825)

Some goods had been stolen from the warehouse of one Clarke, and there being reasonable grounds for believing that Wright was guilty of the larceny, Clarke communicated his suspicions to Court, who was a constable, and who arrested Wright without a warrant. As there was not at the time of the arrest sufficient evidence to make it advisable to present the case to a magistrate, the constable kept Wright in confinement for three days in order to enable Clarke to collect the requisite proof. At the end of that period, Wright was taken before a magistrate, in handcuffs, and charged with larceny, whereupon, as it seems, after a hearing he was discharged on account of the insufficiency of the evidence against him.

Wright brought this action against the constable and his assistants for false imprisonment, the declaration alleging, by way of aggravation, that he had been handcuffed when taken before the magistrate. The defendants pleaded, in substance, what has been stated; and, as to the handcuffing, the plea alleged that the defendants handcuffed the plaintiff "in order to prevent his escape," but did not aver that such rigor was necessary for that purpose.

On demurrer to the plea, judgment was given for the plaintiff, the court holding that, though the arrest was justifiable, the defendants had no right to detain the plaintiff while evidence was in preparation, and that such unlawful detention constituted false imprisonment.

PER CURIAM: It is the duty of a person arresting any one on suspicion of felony to take him before a justice as soon as he reasonably can: Com. Dig. Imprisonment, H. 4; and the law gives no authority, even to a justice, to detain a person suspected but for a reasonable time that he may be examined: *Ib.* 4, 5. The justice might have been justified in ordering this plaintiff to be detained until Clarke could bring his witnesses, but it is clear that the defendants had no authority to detain him without such order.

The defendants have also justified handcuffing the plaintiff, in order to prevent his escape, but they do not aver that it was necessary for that purpose or that he had attempted to escape. For these reasons the special plea is insufficient, and judgment must be given in favor of the plaintiff.

Barratt vs. Price, 9 Bingham, 566. Common Pleas (1833).

Some person, having brought suit against Price, procured a warrant for his arrest to be issued and lodged with the sheriffs of London for execution. The sheriffs delivered this warrant to William Jackson, one of their deputies. While the warrant was in the possession of William Jackson, the defendant was arrested by Richard Jackson, a son and assistant of William. The junior Jackson, having made the arrest without warrant, lodged Price in a police station upon a fictitious charge of felony. Richard then brought his father to the station, and the elder Jackson turned over the warrant to his son, whereupon the latter served it upon the prisoner in an endeavor to validate the previous illegal arrest.

Upon a showing of these facts to one of the judges, it was ordered that Price be discharged from custody. It happened, however, that the sheriffs had another warrant for the arrest of Price, which had been issued in a suit against him brought by Barratt; and the sheriffs conceived that it was their duty to hold the prisoner in virtue of this process.

Held, that Price was entitled to be released, since he was not legally in custody, and the second writ did not operate to warrant his continued detention.

TINDAL, C. J.: The question now arises, whether the sheriffs can legally detain the defendant in custody under another writ which they held against him at the time of such illegal arrest. And we are of opinion that they cannot; and the ground on which this opinion is formed is shortly this—that the first arrest was illegal by the wrongful act of the sheriff himself. * * *

The principle to be derived from the cases appears to be that, where the sheriff arrests the defendant in one action, it operates virtually as an arrest in all the actions in which the sheriff holds writs against him at the time; for it would be only an idle and useless ceremony to arrest the defendant in the rest; it would be *actum agere;* and this detainer will hold good, though the Court may, upon collateral grounds unconnected with the act of the sheriff, order the party to be discharged from the first arrest. But where the sheriff has by his own act illegally arrested the defendant, the defendant is not in custody under the first writ; he is suffering a false imprisonment; and such false imprisonment, being no arrest in the original action, cannot operate as an arrest under the other writs lodged with the sheriff.

Justification Without Warrant.

Baynes vs. Brewster, 2 Queen's Bench 375 (1841).

The plaintiff, in his declaration, alleged that he had been assaulted and imprisoned by the defendant. The defendant pleaded that he was possessed of a dwelling house, in which he resided with his family; that the plaintiff, without the leave or license of the defendant, at an unreasonable hour, to wit, at nine o'clock in the evening, entered the said house and made a great noise and disturbance therein, and insulted and abused the defendant, and greatly disturbed him in the peaceable possession of the said house, in breach of the peace of our lady the Queen; whereupon the defendant requested the plaintiff to depart from and out of the said house, which the plaintiff reluctantly did; and thereupon the plaintiff threatened that he would stand and rap at the back door of the said house until the defendant should deliver up to the plaintiff a certain book then in the possession of the defendant; that the plaintiff then stood for two hours at the back door of the said house, knocking on the said door, and insulting and abusing the defendant and his family and his servants, in further breach of the peace;

that, thereupon, the defendant sent for one J. C., a constable, for the purpose of arresting the plaintiff; that the plaintiff, learning that he was to be arrested, ceased the knocking and rapping, which he had thereunto continued, and ran away from the defendant's premises; that the defendant, with the said constable and other persons, pursued the plaintiff and arrested him to preserve the peace and to prevent him from further disturbing the defendant throughout the night; the arrest being made in a close near to the said dwelling house of the defendant; that the plaintiff was detained by the said J. C. until the next morning, when he was taken before a justice of the peace to be dealt with according to law; *quae est eadem,* etc.

Replication *de injuria absque tali causa.* At the trial the defendant obtained a verdict on his plea. The plaintiff moved for judgment *non obstante veredicto.* The court was of opinion that the plea, which confessed the imprisonment of the plaintiff, did not show facts sufficient to justify that action; wherefore the motion prevailed, and the plaintiff had judgment on the pleadings and despite the verdict.

LORD DENMAN, C. J.: The plea here states that the plaintiff was conducting himself in a violent and illegal manner before he was apprehended, but that he had ceased to do so when the apprehension took place. The violent and illegal conduct was then over; and it is not stated that it would have been repeated if the apprehension had not taken place, or that the apprehension was necessary for the purpose of preventing the repetition. It is alleged that the defendant "immediately" followed the plaintiff and overtook him "near" the dwelling house of the defendant; but how soon the plaintiff was followed, and how near he was to the dwelling house when overtaken, we are not informed. No averment is made as to the plaintiff's intention at the time when he was overtaken; but it is alleged that the defendant, in order to preserve the peace and prevent the plaintiff from continuing to disturb the tranquility of the defendant's dwelling house, and making a noise there, gave charge of him to a constable. That is, after the plaintiff has gone from the dwelling house, the defendant tells the constable to prevent the plaintiff from doing what it was impossible he should do in the place where he then was.

We are, indeed, told to infer from the verdict of the jury all the facts necessary to support such a verdict. But we cannot support it without drawing a very strained inference from a very feeble statement. Nothing is averred but the defendant's motive; and we are required to treat the averment of his intention to prevent the continuing of the disturbance as an averment that the disturbance was being continued or likely to be continued. It would be an abuse of language to do so. No aver-

ment appears showing directly even that the party apprehending had any actual expectation that the disturbance would be continued.

WILLIAMS, J.: It is not a question in this case, how far a constable is justified in interfering where an affray is going on in his presence; but no principle is more generally assumed than that a warrant is necessary to enable him to interfere after the affray is over. It is otherwise where the facts show that the affray is practically going on. That is on account of the obvious distinction, as to public danger, between a riot still raging and one no longer existing. The language of the plea here falls infinitely short of showing those facts upon the supposition of which alone the argument for the defendant is sustainable. The disturbance appears to have been discontinued before any act was done of which the plaintiff complains. After that, according to the plea, with a view of preventing a renewal of the disturbance, the defendant followed the plaintiff and gave him into custody. This we cannot hold to be a good defence, unless we are prepared to maintain that, wherever a breach of the peace has taken place, the party who has committed it may, no matter at what distance of time and place, be apprehended without a warrant.

COLERIDGE, J.: The plaintiff quitted the premises when he ascertained that the constable was coming. The plea does, indeed, allege that the defendant gave the plaintiff into custody in order to prevent a continuance of the breach of the peace; but it is not averred that the plaintiff, after quitting the premises, either threatened or intended to continue the breach of the peace. The plea, therefore, contains nothing equivalent to an allegation that another breach of the peace was about to be committed. The question is simply whether, after a breach of the peace is over, a constable who has not seen it may take up the party without warrant.

Then it is contended that, after verdict, we must infer all the facts necessary to support the verdict. But the plea here contains nothing of which proof might not have been given without evidence of circumstances necessary to complete a good defence.

Timothy vs. Simpson, 1 Cr. M. & R. 757. Exchequer (1835).

The defendant was a linen-draper. The plaintiff, in passing the defendant's shop, saw an article in the window with a ticket apparently attached to it and denoting a low price, and sent his companion in to buy it. The shopman demanded a larger price. The plaintiff himself then entered the shop and required the article at the lower price. Some of the shopmen, in an offensive manner, ordered him to leave the place, which he refused to do unless he should be given the article at the price which he offered. The shopmen pushed him out. Before

they did so he had declared that he would strike any one who laid hands on him. One of the shopmen, really supposing or pretending to suppose this to be a challenge to fight, stepped out and struck the plaintiff in the face; the plaintiff went back into the shop and returned the blow, and a contest commenced, in which the other shopmen took a part and fell on the plaintiff. There was a great noise in the shop, so that business could not go on; many persons were there, and others about the doorway to the street. The noise brought down the defendant, who was sitting in the room above. When he came down he found the shop in disorder, and the plaintiff on the floor struggling and scuffling with the shopmen; and this scuffle continued in the defendant's presence for two or three minutes. The defendant sent for a policeman who soon afterwards came; in the meantime the plaintiff was taken hold of by two of the shopmen, who, however, relinquished their hold before the policeman came; and, on his arrival, the plaintiff was requested by the defendant to go from the shop quietly; but he refused, unless he first obtained his hat which he had lost in the scuffle. He was standing still in the shop, insisting on his right to remain there, and a mob gathering round the door, when the defendant gave him in charge to the policeman, who took him to the police station. The defendant followed; but, on the recommendation of the constable at the station, the charge was dropped. The plaintiff brought this action for false imprisonment. *Held,* that he was not entitled to recover.

PARKE, B.: Upon these facts the plaintiff appears to have been in the first instance a trespasser, by refusing to quit the store when requested, and so to have been the cause of the affray which subsequently took place; but the first act of unlawful violence and breach of the peace was committed by the shopman; that led to a conflict in which there were mutual acts of violence clearly amounting to an affray, the latter part of which took place in the defendant's presence; and the plaintiff was on the spot on which the breach of the peace occurred, persisting in remaining there under such circumstances as to make it probable that the breach of the peace would be renewed, when he was delivered by the defendant to the police officer in the very place where the affray had happened.

The first question which arises upon these facts is, whether the defendant had a right to arrest and deliver the plaintiff to a constable, the police officer having by the Stat. 10 Geo. 4, c. 44, s. 4, the same powers

as a constable has at common law. * * * It is unquestionable that any bystander may, and ought to, interfere to part those who make an affray, and to stay those who are going to join in it till the affray is ended. It is also clearly laid down that he may arrest the affrayers, and detain them until the heat be over, and then deliver them to a constable. * * * It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace officer. And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it? Both cases fall within the same principle, which is, that for the sake of the preservation of the peace any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shows that the public peace is endangered. In truth, whilst those are assembled together who have committed acts of violence, and the danger of their renewal continues, the affray itself may be said to continue, and during the affray the constable may, not merely on his own view, but on the information and complaint of another, arrest the offender; and, of course, the person so complaining is justified in giving the charge to the constable. Lord Hale, P. C. v. 2, p. 89.

The defendant, therefore, had a right in this case, the danger continuing, to deliver the plaintiff into the hands of the police officer, unless the circumstance that the plaintiff was not guilty of the first illegal violence make a difference. Now, at the time the defendant interfered, he was ignorant of that fact; he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate, for the sake of securing the peace of his house and neighborhood, and the persons of all those concerned, from violence; and if he had the power to arrest at all, he was justified in securing any one, not absolutely, but only until a magistrate could inquire into all the circumstances on oath, and bind over one party to prosecute, or the other to keep the peace, as, upon a review of all the circumstances, he might think fit. If no one could be restrained of his liberty, in cases of mutual conflict, except the party who did the first wrong, and the bystanders acted at their peril in this respect, there would be very little chance of the public peace being preserved by the interference of private individuals, nor indeed of public officers, whose power of interposition on their own view appears not to differ from that of any other of the King's other subjects. For the reasons we are of opinion that the defendant was, upon the facts in evidence, justified in delivering the plaintiff to the police officer.

Baltimore & Ohio R. R. Co. vs. Cain, 81 Md. 87 (1895).

The plaintiff and three companions boarded a train of the railway company, at Washington Grove, with the intention of riding to Washington, D. C. They had been drinking and were disorderly in the train,

and one of them insisted upon smoking in a car which was not a smoking car. When the conductor sought to check the disorder, they became abusive and so offensive that ladies occupying the same car were compelled to go into others. The conductor, being unable to control the four men, permitted them to ride to Washington. Upon the arrival of the train at that point, in response to a telegram sent by the conductor, a police officer met the train and arrested the men whom the conductor pointed out. They were taken to the station house and afterwards fined by the Police Court. Cain brought this suit against the company for the action of its conductor in causing him to be arrested, contending that it was not a case in which an arrest without a warrant was justifiable.

Held, that the plaintiff's conduct amounted to a breach of the peace which justified his arrest without a warrant.

McSHERRY, J.: * * * It is well settled that an officer has the right to arrest without a warrant for any crime committed within his view. It was his duty to do so at the common law, and this is still the law: Phillips vs. Trull, 11 Johns, 486; and in cases of felony he may arrest upon information, without warrant, where he has reasonable cause: Rex vs. Birnie, 1 M. & R. 160. And so any person, though not an officer, in whose view a felony is committed, may arrest the offender. Ruloff vs. The People, 45 N. Y. 213. But the right of a person not an officer to make an arrest is not confined to cases of felony, for he may take into custody, without a warrant, one who in his presence is guilty of an affray or breach of the peace. Knot vs. Gray, 1 Root, 66.

PARKE, B., in Timothy vs. Simpson, 1 C. & M., R. 757, said: "It is unquestionably true that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended. It is also clearly laid down that he may arrest the affrayers and detain them until the heat be over, and then deliver them to a constable. * * * It is clear, therefore, that any person present may arrest the affrayer at the moment of the affray, and detain him until his passion has cooled and his desire to break the peace has ceased, and then deliver him to a peace officer." . . .

Now, if it be true that the plaintiff was guilty of the reprehensible and disorderly conduct attributed to him, by the witnesses, he was incontestably engaged in a flagrant and an outrageous breach of the peace; as pronounced as if there had been an actual affray during the whole time he was in the defendant's car; it was clearly lawful, and under these conditions, for the conductor to expel him and his drunken companions from the train, if he had a sufficient force to overcome their threatened resistance, or else to arrest them all without warrant and then deliver them to the first peace officer he could procure within a reasonable time If this were not so, then, as LORD, C. J. DENMAN in Webster vs. Watts. 11 Q. B. 311, said, "the peace of all the world would be jeopardy." And it would be in jeopardy, because if in such and similar instances no arrest could be lawfully made without a warrant, the culprit, "if transient and unknown, would escape altogether," before a warrant could be obtained. Mitchell vs. Lemmon, 34 Md. 181.

Beckwith vs. Philby, 6 B. & C. 635. King's Bench (1827).

The plaintiff, a blacksmith, residing in the county of Hertford, had gone to Romford market in Essex and there sold a horse of his. He started to return to his home on foot, carrying a saddle and a bridle on his back; but, when he had travelled some distance from Romford, his appearance excited such suspicion that the defendant, Philby, being the high constable of Essex, stopped him and asked him some questions. Beckwith's answers, with other circumstances, caused Philby to believe that the plaintiff had stolen a horse, and therefore to arrest him. The prisoner was turned over to two other constables, Wilks and Spicer, who kept him over night and brought him on the next morning before a magistrate, whereupon, after an examination and the appearance of a resident who became bound for his appearance when again wanted, Beckwith was discharged. He sued the three constables for false imprisonment. At the trial there was no proof that any horse had been stolen or that the plaintiff had committed any other felony; but the jury were of opinion that his appearance and the other facts afforded reasonable ground to suspect him to have been guilty of larceny and so gave a verdict for the defendants. This action, and the instructions of the trial judge in accordance with which the jury proceeded, were approved by the full bench, and the defendants had judgment on the verdict.

LORD TENTERDEN, C. J.: Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he was detained in custody an unreasonable time, were questions of fact for the jury, which they have decided against the plaintiff, and in my judgment most correctly. The only question of law in the case is, whether a constable, having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private person and constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. Now in this case it is quite clear upon the evidence, and the jury have so found, that the conduct of the plaintiff had given the defendants just cause for suspecting

that he either had committed, or was about to commit a felony, and the jury having so found, I am of opinion that the action was not maintainable.

Hogg vs. Ward, 3 H. & N. 417. Exchequer (1858).

One Johnson, an itinerant showman, had lost some traces, which he supposed to have been stolen from him in 1856. The plaintiff had bought a pair of traces from a stranger, who had picked them up in a road. In June, 1857, the plaintiff drove to a fair, about three miles from his home, with the purchased traces on his horse. There Johnson identified the traces as those stolen from him and demanded that the defendant, who was superintendent of police for that district, take Hogg into custody on a charge of larceny. Ward asked the plaintiff how he had gotten the traces, and the latter stated the manner of his acquiring them. Although Ward resided within three miles of Hogg's home and had known Hogg for many years, yet, upon Johnson's insistent demand, the defendant arrested the plaintiff, handcuffed him, kept him locked up over night, and the next morning took him before a magistrate, who immediately discharged him. In an action brought on this account by Hogg, the plaintiff was allowed to take a verdict for damages, subject to the opinion of the court upon the question whether the defendant had probable cause for the arrest. The court held that the facts did not afford such probable cause, and the plaintiff had judgment.

MARTIN, B.: The law is correctly laid down in Burns' Justice, vol. 1, p. 273, 29th ed., where it is said that a constable may "apprehend a supposed offender for a felony without warrant upon a reasonable charge made by a third party, and this although upon investigating the charge it turn out that no felony has been committed. But there must in all cases exist a reasonable charge and suspicion." Therefore, the constable is bound to ascertain whether the charge is reasonable. I am of opinion that the charge in this case was not reasonable. The traces which were on the plaintiff's horse were alleged to have been stolen. The plaintiff was not present at the time the charge was first made, but, on being sent for, he came and gave an account of how he became possessed of the traces; but, in defiance of all that, the defendant arrested and imprisoned him. Looking at all the circumstances, I cannot think that the charge was reasonable, or that there was any real suspicion that the plaintiff had stolen the traces.

BRAMWELL, B.: I am of the same opinion. The law is correctly laid down in Burns' Justice. It is not every idle and unreasonable charge which will justify an arrest, but there must be a charge not unreasonable. The Metropolitan Police Act, 2 and 3 Victoria, c. 47, s. 64 [1839], authorizes "any constable belonging to the metropolitan police to take into custody, without a warrant, all persons whom he shall have good cause to suspect of having committed, or being about to commit, any felony, misdemeanor or breach of the peace." This does not say that any charge is enough, but by implication says that only such charge as gives the constable good cause to suspect the person charged. If a person comes to a constable and says of another *simpliciter*, "I charge this man with felony," that is a reasonable ground, and the constable ought to take the person charged into custody. But if from the circumstances it appears to be an unfounded charge, the constable is not only not bound to act upon it, but is responsible for so doing. Here the question is whether the charge was not unreasonable. In my opinion it was a charge most unreasonable. * * * The plaintiff used the traces in the most open manner; and, when asked, told how he got possession of them, and moreover the person who claimed them was a person not unlikely to have lost them.

Allen vs. Wright, 8 C. & P. 522. Nisi Prius (1838).

The plaintiff, a young woman, and a man named Davidson had for sometime occupied a room in the defendant's house, where they were known as Mr. and Mrs. Gordon. The bed in this room was described as one quite full of feathers, for which reason the plaintiff was in the habit of getting a servant in the house to assist her in making it up, saying that one person could not make it properly. After a time the plaintiff ceased to call upon the servant for help in making the bed, and would always lock the door on leaving her room; and it was observed that, when she went out, she would frequently carry a bundle under her arm. On a certain Friday evening, the plaintiff and Davidson left the defendant's house, having given up and paid for their room, and they took lodgings elsewhere. After the departure of the couple, Wright discovered, or thought that he discovered, that about half of the feathers, to the weight of seventy pounds, had been taken from the bed in the room vacated. He also learned from his servant the facts which have been mentioned relating to the plaintiff's habits. On the evening of the following Monday, the defendant and his wife went to the neighborhood of the plaintiff's new lodgings and found a police officer, to whom they stated the loss of their feathers. The officer knocked at the door of the house wherein the plaintiff lodged, and was admitted together with the defendant and his wife, and they asked for Mrs. Gordon. It being now twenty minutes past ten, the plaintiff sent down the answer that she could not see Mr. Wright that night. Thereupon Wright and the policeman went upstairs and found the plaintiff in her room. The policeman inquired of Wright whether she was the person who was sought; Wright answered that she was; and the officer obliged

the young woman to go with him to a station house. Here she was kept all night, and on the next morning she was taken before a magistrate on the charge of larceny, by whom she was discharged. It was made to appear that Miss Allen was adequately supplied with means of support by Davidson; and there was some testimony to the effect that the bed which was supposed to have been robbed was a very old one and had feathers sufficient for its size.

This action was brought for the imprisonment of the plaintiff in the station house. Upon proof of the facts just stated, the defendant contended that he had had reasonable ground to believe the plaintiff guilty of stealing the feathers. The court left it to the jury to say whether or not that was so, and the jury returned a verdict for the plaintiff, allowing her damages to the amount of £5.

TINDAL, C. J. [to the jury, after stating the defence, said]: That is an answer which it is incumbent on him to make out to your satisfaction, because he has taken the law into his own hands by not acting as any prudent person would have done, viz., by going before a magistrate and taking out a warrant. At all events, the defendant acted in a very indiscreet manner (as there was no reason to conclude that the plaintiff had any intention to abscond) in not taking the usual and cautious step of having the case investigated by a magistrate before imprisoning the party.

The only two points upon which you must be satisfied before you can find a verdict for the defendant are:

1st, that a felony had actually been committed; that some person or other had stolen, according to the evidence, about half the feathers from the bed; and,

2nd, that the circumstances were such that you yourselves, or any reasonable person, acting without passion and prejudice, would have fairly suspected the plaintiff of being the person who did it. If you think the circumstances were such, you will find a verdict for the defendant; if you do not, you will find your verdict for the plaintiff, and give her such reasonable damages as you think she is entitled to.

Holley vs. Mix, 3 Wendell, 350. New York (1829).

David Mix, a resident of Schenectady, and one of the defendants herein, conceived the notion that a ten-dollar bill of his had been stolen by Holley, who became the plaintiff in this action. Whether or not there was reasonable cause for supposing that the bill had been stolen does not appear from the report, and the question was held by the Court to be immaterial, inasmuch as at the trial it was impossible to prove that a larceny had in fact been committed by anybody. David Mix did not, himself, take any steps to apprehend the supposed thief; but Stephen Mix, a brother of David, obtained from a justice of the peace, named Davis, a warrant authorizing the arrest of Holley on the charge of larceny from David Mix; and this warrant Stephen himself was deputed to execute. Holley had departed from Schenectady, but was overtaken at some distance from that place. Meanwhile Stephen

had lost his warrant; wherefore, instead of arresting the fugitive, Mix merely requested him to return to Schenectady. This Holley refused to do. Mix then obtained from another magistrate another warrant of arrest; but, as it seems that he had forgotten the name of the accused, the new warrant ran merely against John Doe. This warrant was delivered for execution to a constable of the name of Clute, who was afterwards made a defendant to this action; and Stephen Mix told Clute that Holley had stolen some money at Schenectady. Clute and Mix pursued Holley and overtook him, whereupon he was arrested by Clute and taken before the justice who had issued the second warrant. Here Holley gave his name; and the justice substituted that name for that of John Doe in the warrant, re-delivered the warrant to Clute, and directed him to bring the prisoner before the special sessions. Clute and Mix, however, took Holley back to Schenectady, and went directly to the shop of David Mix. The latter declared that the matter could not be settled, and directed the constable to take the prisoner to Justice Davis for trial. Instead of so doing, Stephen and the constable took Holley to a tavern, where Clute talked to him in a back room whilst David Mix walked up and down an adjoining corridor. As the result of the constable's persuasion, Holley gave David Mix eleven dollars to settle the matter, and Clute got his fees. Holley sued David Mix and Clute for false imprisonment. The jury allowed him $25 against Mix and six cents against Clute, an apportionment of damages which was contrary to principle and which was rectified by the Supreme Court in the decision now to be set out.

SAVAGE, C. J.: There is certainly an inaccuracy in the charge of the judge as stated in the bill of exceptions. The judge is represented as laying down the broad proposition, that a felon can in no case be arrested without a warrant when there is time to obtain one. My understanding of the law is that, if a felony has in fact been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time to obtain one or not.

If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on. These principles will be found substantially in 1 Chitty Criminal Law, 15.

The case of Samuel vs. Payne and others, 1 Douglass, 359, supports the distinction in the above proposition. In that case a search warrant was taken out by Hall, one of the defendants, upon a charge of theft; but the warrant did not authorize the arrest. The goods were not found, but the plaintiff was carried before a magistrate and discharged. On the trial [A. D. 1780] LORD MANSFIELD laid down the law, that, if a felony has been committed, any man, upon reasonable probable ground of suspicion, may justify apprehending the suspected person and carrying him before a magistrate; but if no felony has been committed, such

arrest can not be justified by anybody. The Court, however, thought the rule too narrow, and said that, if any person charge another with felony and desire an officer to take him in custody, such charge will justify the officer, though no felony was committed; but the person making such charge will be liable, and upon a new trial a verdict was found against Hall, but in favor of the officers.

A similar decision was made in Hobbs vs. Branscomb and others, 3 Campbell, 420, where the plaintiff had been improperly arrested upon a charge of felony where no felony was committed. For the defendants, the case of Samuel vs. Payne was relied on, and a *nisi prius* decision of MR. JUSTICE BULLER, in which he held that, "If a peace officer of his own head takes a person into custody on suspicion, he must prove that there was such a crime committed; but if he receives a person into custody on a charge preferred by another of felony or a breach of the peace, then he is to be considered as a mere conduit, and, if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable." LORD ELLENBOROUGH said this rule appeared to be reasonable, and that injurious consequences might follow if peace officers, under such circumstances, were personally responsible should it turn out that in point of law no felony had been committed.

It was not contended upon the trial that a felony had been committed; an action would therefore lie against Stephen Mix, but not against the constable, Clute, provided the arrest was made with a *bona fide* intention of bringing a supposed offender to justice. Thus far there is no evidence against David Mix; and, had the case stopped here, a verdict for the defendants should have been directed.

The warrant against John Doe did not authorize the arrest of any person other than John Doe. It was altered by inserting the name of the present plaintiff, and then it was a justification for all subsequent regular acts of all concerned in its execution. At this stage of the proceedings, a shade of suspicion is cast upon the *bona fides* of the whole transaction. The justice directs the constable to take the supposed culprit to Schenectady for trial, but he did not attend for that purpose, nor take any steps preparatory thereto, nor could in fact any trial be had within forty-eight hours, unless by the consent of the accused. It was the duty of the justice to have taken the examination of the person brought before him; instead of doing so, he sent him to Schenectady. When there, the defendant, D. Mix, directed the constable to take him before Justice Davis, who issued the first warrant, and the justice gave the same direction; but the constable went to a tavern, and so did the defendant Mix; and, while the constable was probably frightening the prisoner in a back room, the defendant Mix was walking the hall, waiting the result of the conference between the constable and the prisoner. He gave no further orders to go before the justice; and, when the constable gave him ten dollars, he said no more about the impossibility of a settlement. It was in reference to these facts that the judge charged the jury that, if the object of the two defendants was to extort money from the prisoner by working upon his fears, they were liable in this action. In this I think the judge was right. Had the constable performed his duty by taking the plaintiff before a magistrate, he would

have been justified; but, having lent himself, according to the finding of the jury, to the unholy purpose of oppression, he lost the protection which the law would give him in the discharge of his official duty, and became a trespasser, and so did David Mix, who acted in concert with him. There is no reason, therefore, for granting a new trial.

And, as there can be but one assessment of damages, the plaintiff is permitted to enter a *nolle prosequi* against Clute and perfect judgment against Mix. This practice is justified by the cases cited: 1 Saunders. 207, note 2; and the reason there given seems to be sound; that, as this action is several as well as joint, and as the plaintiff might originally have commenced his action against one only, so after verdict he may elect to take his damages against either of them; and where several damages are given, the plaintiff may cure the irregularity by entering a *nolle prosequi* against all but one, and take judgment against him alone: 6 T. R. 199 [Mitchell vs. Milbank].

Hobbs vs. Branscomb, 3 Campbell, 420. Nisi Prius (1813).

Hobbs, an attorney, was employed by Mrs. Rye to recover for her a legacy of £170. After some litigation, a meeting was had, at which the executors paid the sum sued for in bank-notes to Mrs. Rye. She, being unable to read, requested Hobbs to count the money. He did so, and then put the notes into his pocket, saying that his bill for services was £20 and he would settle with her by and by. Mrs. Rye called in Branscomb and Dunkwater, who were constables, and accused Hobbs of having stolen her money. The constables took Hobbs before the Lord Mayor, where he restored the money to Mrs. Rye. At the trial of this action for false imprisonment, brought by Hobbs against the persons concerned in arresting him, LORD ELLENBOROUGH, presiding, directed a verdict in favor of the constables, and the jury gave a verdict for 1s. in favor of Hobbs against Mrs. Rye and the other defendants, who had advised her to arrest Hobbs.

Justification by Warrant.

West vs. Cabell, 153 U. S. 78. Supreme Court of the United States (1894).

Cabell was the United States Marshal for the Northern District of Texas, and one of his deputy marshals was a certain Johnson. In the course of his official duties, Johnson was apprised that one James West was accused of a murder committed in Arkansas and that the same West was living in Palo Pinto County in Texas. Inquiry of the sheriff of Palo Pinto County elicited the information that only one man of the name of West resided in that county, and that this man in personal

appearance quite closely corresponded with the description of the James West who was wanted in Arkansas.

The plaintiff, Vandy M. West, lived in Palo Pinto County, having removed thither from Colorado about eight months before Johnson made his inquiries. Either Johnson did not ascertain the Christian name of this West, or he regarded it as of no importance; for, as Johnson himself testified, "in that section of the country it was frequently the case that men were known by other than their correct names," and he "attached but little importance to the name by which a man was called." Accordingly, Johnson, having satisfied himself that Vandy M. West was in fact the James West who was charged in Arkansas with murder, went before a United States Commissioner and procured a warrant for the arrest of James West on that charge. The person whose arrest Johnson intended was the plaintiff; and the person whom the Commissioner had in mind and whose arrest he intended to authorize was the man named West who lived in Palo Pinto County and who was identified to the Commissioner's mind by the description given by Johnson. Upon this warrant Vandy M. West was arrested, twenty miles from his home, by Johnson, was carried sixty miles and lodged in jail, and was not released for twenty days, after the lapse of which time a witness who knew James West declared that the plaintiff was not that person.

Vandy M. West then sued the marshal and the sureties upon his official bond for false imprisonment. The trial court permitted the defendants to show the facts as here stated, and instructed the jury to find for the defendants if satisfied that the plaintiff was the person really intended by the Commissioner to be designated in the warrant and to be arrested. The verdict was for the defendants. The judgment entered thereon was reversed by the Supreme Court of the United States on account of the error committed by the trial court in admitting proof of the Commissioner's intention and in ruling that the warrant justified the arrest of the plaintiff.

GRAY, J.: By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him. If it does not, the officer making the arrest is liable to an action for false imprisonment; and if, in attempting to make the arrest,

the officer is killed, this is only manslaughter in the person whose liberty is invaded: 1 Hale P. C. 577, 580; 2 Hale P. C. 112, 114; Forter's Crown Law, 312; 1 East. P. C. 310; 1 Chitty Crim. Law, 39, 40; Huckle vs. Money, 2 Wilson, 205; Money vs. Leach, 3 Burrow, 1742; Rex vs. Hood, 1 Moody C. C. 281; Hoye vs. Bush, 1 Man. & Gr. 775; S. C. 2 Scott N. R. 86. Likewise a warrant of arrest in a civil action, which does not name or describe the person to be arrested is no justification of the officer: Cole vs. Hindson, 6 T. R. 234; Shadgett vs. Clipson, 8 East. 328; Finch vs. Cocken, 2 Cr. M. & R. 196; Kelly vs. Lawrence, 3 H. & C. 1. The principle of the common law, by which warrants of arrest, in cases civil or criminal, must specifically name or describe the person to be arrested, has been affirmed in the American Constitutions; and by the great weight of authority in this country a warrant that does not do so will not justify the officer making the arrest: Commonwealth vs. Crotty, 10 Allen, 403; Griswold vs. Sedgwick, 6 Cowen, 456, and 1 Wend. 126; Mead vs. Haws, 7 Cowen, 332; Holley vs. Mix, 3 Wend. 350; Scott vs. Ely, 4 Wend. 555; Melvin vs. Fisher, 8 N. H. 407; Clarke vs. Bragdon, 37 N. H. 562; Johnson vs. Riley, 13 Georgia, 97; Scheer vs. Keoun, 29 Wisc. 586; Rafferty vs. People, 69 Illinois, 111.

In Commonwealth vs. Crotty, for instance, in which Morris Crotty and others were indicted and convicted for a riot in resisting the arrest of Crotty upon a warrant commanding the arrest of "John Doe or Richard Doe, whose other or true name is to your complainant unknown," the conviction was set aside by the Supreme Judicial Court of Massachusetts, upon the grounds that the warrant was insufficient, illegal and void, because it did not contain Crotty's name, nor any description or designation by which he could be known or identified as the person against whom it was issued, and was in effect a general warrant, upon which any other person might as well have been arrested, as being included in the description; and that "the warrant being defective and void on its face, the officer had no right to arrest the person upon whom he attempted to serve it; he acted without warrant and was a trespasser; the defendant whom he sought to arrest had a right to resist by force, using no more than was necessary to resist the unlawful acts of the officer; an officer who acts under a void precept, and a person doing the same act who is not an officer, stand on the same footing; and any third person may lawfully interfere to prevent an arrest under a void warrant, doing no more than is necessary for that purpose." 10 Allen, 404, 405. * * *

The only cases cited by the defendants in error, which have any tendency to support the rulings at the trial, were in Delaware, in which the chief justice dissented, and in Iowa and Arizona, whose statutes provided that "the warrant must specify the name of the defendant, and, if it be unknown to the magistrate, may designate him by any name;" and in none of these cases was any notice taken of opposing precedents or constitutional injunction: Bailey vs. Wiggins, 5 Harrington (Del.), 462; Allen vs. Leonard, 28 Iowa, 529; Williams vs. Tidball, 8 Pac. Rep. 351. In the case at bar, the effect of the rulings and instructions of the Court was to give the jury to understand that the private intention of the magistrate was a sufficient substitute for the constitutional requirement of a particular description in the warrant. For this reason, the

wapentake of Candleshoe (except the parishes of Hagnaby, Welton in Marsh, Steeping Magna and Firsby), in the county of Lincoln; and for the wapentakes of Gartree, South-Eske, Ludborough, Calesworth, Hill and Walshcroft, the north and south divisions of the wapentake of Yarborough, such parts of the wapentake of Manley as lie east of the river Trent, and the parishes of Faldingworth, Buslingthorpe, Snarford, Friesthorpe and Hanworth in the said county." This court was given jurisdiction in cases, involving £5 or less, brought against persons residing or doing business in the districts named in the title of the act, excepting those districts therein excepted and excepting also the wapentake of Wraggoe. The court was composed of five commissioners, who had authority to enter orders or decrees in cases within the jurisdiction defined by the statute; and it was provided that, where such an order or decree was for the payment of money, it should be lawful "to and for the said commissioners present in court to award execution either against the body or goods of the party against whom such order or decree shall be made; and thereupon it shall and may be lawful to and for the respective clerks and deputies of the said court, at the prayer of the party prosecuting such order or decree for the payment of money, to issue a precept under their respective hand and seal, by way of *capias ad satisfaciendum* or *fieri facias,* to the respective sergeants of the said court," by virtue of which precept the person adjudged to pay money should be lodged in some jail and there confined until he should perform the order or decree. It was further provided, in the same section, that the order or decree might provide for the payment of the adjudged indebtedness by installments, and that it should be competent for the "commissioners present in court," in case default should be made in the payment of such installments, "to award execution against the said defendant" so defaulting, "upon due proof of the said default or failure."

Marris was, in 1837, the clerk of this court, and Whitham was one of the sergeants. In that year one Davey obtained in the court a judgment or order against Andrews, whereby the latter was required to pay to Davey £5, at the rate of 10s. per month. Andrews, having made default in the payment of cer-

tain installments due under this order, Davey applied to Marris for a warrant of arrest to enforce the order. Marris, without consulting the commissioners or any of them, but acting as he supposed according to the direction of the statute, issued such a warrant, which was delivered to Whitham for execution. The warrant was entitled in the Court of Requests, which was described by the full name given to it in the Act of Parliament and above set out. By virtue of this writ, Whitham, as sergeant of the court arrested Andrews and lodged him in jail, where he was confined for one hundred days.

Andrews thereafter brought this action for assault and false imprisonment against Marris and Whitham. The defendants pleaded separate pleas, the clerk relying upon the order of the court as his authority for issuing the warrant, and the sergeant setting up the warrant itself as his justification for arresting the plaintiff.

Held, that the clerk was liable for the arrest of the plaintiff, because, by the true construction of the statute, the authority to issue such a warrant was vested in the commissioners alone, and the clerk had no power to act except by their specific direction; but that the sergeant was justified by the warrant, which, being fair on its face, protected him in obeying it.

LORD DENMAN, C. J.: Now, it is clear that, in the present case, the commissioners thought fit to proceed, as to the order for payment. under this latter branch of the section [quoted above]; and, although in the same order they state that execution is to issue unless the payments are duly made, that must either be understood execution according to the manner and with the guards provided by the statute, or it would be void. For the commissioners cannot abdicate their judicial functions and delegate them to their clerk; they must act judicially in court, have due proof made before them, and then award as to them seems just and reasonable. . . .

The case of the defendant Whitham, however, stands on very different grounds. He is the ministerial officer of the commissioners, bound to execute their warrants, and having no means whatever of ascertaining whether they issue upon valid judgments or are otherwise sustainable or not. There would therefore be something very unreasonable in the law if it placed him in the position of being punishable by the court for disobedience, and at the same time suable by the party for obedience to the warrant. The law, however, is not so. His situation is exactly analogous to that of the sheriff in respect of process from a superior court; and it is the well-known distinction between the cases of

the party and of the sheriff or his officer, that the former, to justify his taking body or goods under process, must show the judgment in pleading, as well as the writ; but for the latter it is enough to show the writ only; Cotes vs. Mitchell, 3 Lev. 20; Moravia vs. Sloper, Willes, 30, 34.

Carratt vs. Morley, 1 Q. B. 18. Queen's Bench (1841).

Morley brought a suit against Carratt in the Court of Requests which is mentioned in the last preceding case. Carratt, though served with a summons to appear before the commissioners, did not appear, and the cause was tried in his absence, with the result that the alleged debt was found to be proven and an order was entered requiring Carratt to pay to Morley about £3.

Carratt resided in the wapentake of Wraggoe, which district was by the statute expressly excepted from the territory over which the Court of Requests had jurisdiction. At the trial of Morley's case against him, there seems to have been no evidence as to the residence of the defendant, and there certainly was none showing that he lived within the jurisdiction of the court. The amount fixed by the order not being paid, the commissioners ordered the defendant to be committed to a jail for sixty days. The deputy clerk thereupon issued a warrant for the arrest and commitment of Carratt, which warrant was delivered for execution to Horn, the sergeant of the court,

This warrant was entitled, "The Court of Requests for the sokes of Bolingbroke and Horncastle and other places in the county of Lincoln," and it so described the court, without at any place setting out the full title of the court as fixed by the Act of Parliament and as set out in the statement of the last case above. By virtue of this warrant, Horn arrested Carratt, who was thereby induced to pay the amount adjudged against him.

Carratt then brought this suit against Morley, the five commissioners and Horn, charging them all with false imprisonment. It was considered clear that the proceeding in the case of Morley vs. Carratt was void, because the court had no jurisdiction over Carratt, he being a resident of Wraggoe. Thereupon it was held that Morley, the plaintiff in that action was

not liable for the false imprisonment, upon the principle "that a party who merely originates a suit by stating his case to a court of justice is not guilty of trespass, though the proceedings should be erroneous or without jurisdiction";* that the commissioners were liable for the arrest and imprisonment of Carratt, because they had had no jurisdiction over his person, he not residing within any of the places to which the jurisdiction of the court extended; and that the sergeant was liable, because the warrant was not fair on its face, the defect being that it did not designate the court by its full and correct title, but only by an abbreviated name which was not the equivalent of the statutory title.

LORD DENMAN, C. J.: The doubt as to the commissioners' liability arose from the possibility, as the case was undefended, that there might have been evidence to convince them that the defendant in that suit resided within their jurisdiction. Nothing of this sort, however, appears; nor can we be justified in inferring it from the mere fact that the court acted in a manner which requires it to warrant their proceeding. They ordered that Carratt should be committed to the house of correction for sixty days unless the debt and costs were first paid. The warrant thereupon made out by the clerk was made by their order; and, being without legal authority, they are liable in trespass for the imprisonment which ensued.

The warrant itself was objectionable and void, not truly describing the Court of Requests nor following a style and form prescribed by the act. This ought to be considered as the act of their clerk, not of themselves; but they would have been liable for the excess of jurisdiction, however perfect the form of the warrant might have been been.

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*The correctness of this ruling is questioned by Mr. Bigelow, Leading Cases on Torts, p. 279. One who lays a complaint of crime before a magistrate is not liable if the magistrate causes the arrest of the person complained of, although such action may be beyond the magistrate's jurisdiction: "Where a magistrate has a general jurisdiction over the subject-matter, and a party comes before him and prefers a complaint, upon which the magistrate makes a mistake in thinking it a case within his authority, and grants a warrant which is not justifiable in point of law, the party complaining is not liable as a trespasser, but the only remedy against him is by an action upon the case, if he has acted maliciously. The magistrate acting without any jurisdiction at all is liable as a trespasser in many cases, but this liability does not extend to the constable, who acts under a warrant"; LORD ABINGER, C. B., in West vs. Smallwood, 3 M. & W. 418. In civil cases, however, as Mr. Bigelow points out, a plaintiff who causes the arrest of a defendant acts at his peril, and is liable as a trespasser if the process be void, and so is his attorney: Barker vs. Braham, 3 Wilson, 368; Deyo vs. Van Valkenburgh, 5 Hi'l, 242. And the plaintiff is liable in such a case for the acts of his attorney, though the attorney acted without the express authorization or the knowledge of the plaintiff: Collett vs. Foster, 2 H. & N. 356.

The defect in the warrant, however, deprives the officer of a jurisdiction which he would have possessed if it had been correct, or even substantially good. In that case, the recent decision of this court in Andrews vs. Marris [*supra*] would have applied; but, as the warrant here was such as no law authorized, it can be considered as no more than waste paper, and can afford no justification. There the officer was misled by the clerk furnishing him with a warrant good in form, and issued according to the practice of the court, though the cause was beyond its jurisdiction. Here the cause was beyond the jurisdiction, and the warrant was contrary to the practice.

MALICIOUS PROSECUTION.

Malicious prosecution differs essentially from false imprisonment, the latter being committed by the application of force to the person of the plaintiff by the defendant, or by his direction and authority, and upon his individual responsibility, while the former tort consists in the injury done to the plaintiff through the means of legal proceedings unjustifiably instituted by the defendant.

"There is no similitude or analogy between an action of trespass, or false imprisonment, and this kind of action. An action of trespass is for the defendant's having done that which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the stating of it, is manifestly legal:"

Johnstone vs. Sutton, 1 T. R. 544.

False imprisonment is a trespass; malicious prosecution is done without any force directly exerted by the guilty party, and the remedy is by an action upon the case for the consequences of his wrongdoing. In false imprisonment the moving party acts at his peril, and can justify only by showing the existence of facts which warrant his action. Hence in an action for false imprisonment the plaintiff need not show malice or other improper motive on the part of the defendant; in malicious prosecution malice is an essential element of the case. The advice of counsel is irrelevant to the defendant's responsibility for false imprisonment, while such advice sufficiently excuses an otherwise unwarranted prosecution if it disproves malice. False imprisonment is accomplished without invoking the aid or authority of the law; malicious prosecution is essentially the commission of a wrong by means of legal process; and if there be no such process, or the pretended process be void, an action for malicious prosecution does not lie.

Essentials of Malicious Prosecution. In order to maintain an action for malicious prosecution, the plaintiff must show:

1. That a former prosecution, criminal or civil, was instituted or instigated by the present defendant against the present plaintiff;

2. That the former prosecution has terminated favorably to the present plaintiff;

3. That such prosecution was instituted without probable cause; and,

4. Maliciously; and

5. That such prosecution resulted in legal damage to the present plaintiff.

I. The antecedent proceeding may have been a prosecution on a charge of crime, or it may have been a civil action, as for a debt or for damages; but whether every kind of civil action will afford ground to sue for malicious prosecution is a question diversely answered by the authorities, and one to be considered below with reference to the element of damage.

The prosecution complained of must have been brought in a court of competent jurisdiction; and such injury to the person or the property of the present plaintiff as is relied upon must have been done by the execution of valid process. If the court did not have jurisdiction, or if the present plaintiff was arrested or his property taken either with no warrant at all or by a void warrant, the grievance is not malicious prosecution, but the action must be for false imprisonment, trespass or conversion:

Morgan vs. Hughes, *infra,* p. 124;
Stonehouse vs. Elliott, *infra,* p. 126;
Lewin vs. Uzuber, *infra,* p. 126;
Auerbach vs. Freeman, *infra,* p. 129;
Carratt vs. Morley, *supra,* p. 114.

II. The termination of the antecedent proceeding in the present plaintiff's favor is necessary for the sake of showing that the former prosecution was brought without sufficient cause. Until the original action is determined it is not perceived that it was unjust:

Parker vs. Langly, *infra,* p. 130;
Fisher vs. Bristow, *infra,* p. 131.

If the former suit resulted in a judgment against the defendant therein, now plaintiff, that fact is at least *prima facie* evidence that the proceeding had probable cause; and, in general, it is conclusive against the present plaintiff even though the judgment were reversed or otherwise vacated; and a commitment of the accused, or an indictment found against him, have been held conclusive proof that there was probable cause for the prosecution. Other cases regard these facts as susceptible of rebuttal. But all agree that a conviction, which is unreversed and still remains in force, is conclusive against the maintenance of the present action:

Mellor vs. Baddeley, *infra,* p. 132.

What sort of a termination must be shown is a question not completely settled. An acquittal, or a final judgment for the defendant in the original action, is of course sufficient. Whether the ignoring of the charge by the grand jury, the entry of a *nolle prosequi,* or other mode of disposal short of acquittal, will answer, are points to be considered with reference to the text book.

The mere dismissal or discontinuance of the original prosecution in one form, followed by its immediate renewal in another form, does not effect such a termination as will support an action for malicious prosecution:

Simmons vs. Sullivan, *infra,* p. 131.

Nor does the mere discharge of the accused from imprisonment:

Morgan vs. Hughes, *infra,* p. 124.

III. Probable cause is identical in import with reasonable cause or reasonable ground of suspicion:

Stacey vs. Emery, 97 U. S. 642.

The plaintiff in an action for malicious prosecution must show that the former proceeding was brought without probable cause and maliciously. If, therefore, the present defendant can show either that he had probable cause for instituting the former

proceeding or that he acted without malice, he is entitled to a verdict:

Wheeler vs. Nesbitt, *infra*, p. 134.

And the clearest proof that the present defendant was, in the former case, actuated by malice will not entitle the plaintiff to recover if it appears that there was probable cause for prosecuting him:

Foshay vs. Ferguson, *infra*, p. 136.

Probable cause has been defined as being "such reasonable grounds for suspecting the plaintiff to be guilty of the offence charged as would warrant a cautious man in believing him guilty":

Torsch vs. Dell, 88 Md. 459;
Spitzer vs. Friedlander, 14 App. D. C. 557;

See also definition given *supra* under title False Imprisonment, and cases there cited.

Probable cause, therefore, is not whatever the present defendant may have considered sufficient evidence of guilt, but what would satisfy a cautious man; the defendant may have acted upon what he regarded as sufficient facts, but his good faith and sincere belief will not avail him if the facts would not be sufficient for a cautious man:

Johns vs. Marsh, 52 Md. 323,

Compare on this point:

Vaughan vs. Menlove, *infra*, p. 466.

What facts amount to probable cause is a question of law and to be determined by the court. What facts exist must be left to the jury, who are to be instructed that, if they find the facts which are defined by the court as constituting probable cause, their verdict should be for the defendant:

Boyd vs. Cross, *infra*, p. 138;
Mark vs. Rich, *infra*, p. 140.

The existence or non-existence of probable cause in favor of the present defendant is to be determined with reference to his

knowledge when the former proceeding was brought and to the facts as they then appeared to him. It cannot be said that he did not have probable cause merely upon the proof of facts afterward developing which would negative probable cause: thus if he had reasonable ground to believe that the then defendant was indebted to him, he had probable cause to sue that defendant, even though a subsequent judgment proves that the supposed debt did not exist:

Stewart vs. Sonneborn, *infra,* p. 144;

IV. Malice is an essential element of the tort, and must be proved in addition to want of probable cause. By this is not meant that malice may not be inferred from the absence of probable cause; on the contrary, if an action is brought without reasonable ground for the plaintiff to believe that he has a right to sue, it may fairly be supposed that he was actuated by malice. But the inference is not a necessary one: all persons act at times unreasonably, and in any given case the prosecutor may have been influenced by his hasty suspicions, undue credulity, imperfect information, or idiosyncrasies of mind and temperament. The question of malice must in all cases be left to the jury, whatever may be the opinion of the court as to the inference proper to be drawn:

Mitchell vs. Jenkins, *infra,* p. 142;
Stewart vs. Sonneborn, *infra,* 144;
Boyd vs. Cross, *infra,* p. 138;
Strauss vs. Young, 36 Md. 246.

The malice requisite to be proved is not necessarily actual animosity, or a desire to injure the person prosecuted, or as it is sometimes called, express malice:

Pullen vs. Glidden, *infra,* p. 148.

On the other hand, it seems that such malice is something more than mere malice in law, that is, as defined in Bromage vs. Prosser, *infra,* the intentional doing of a wrongful act without just cause or excuse:

Mitchell vs. Jenkins, *infra,* p. 142;
Stewart vs. Sonneborn, *infra,* p. 144.

The malice may be ill-will or a desire to cause an injury; or it may be some other sinister motive, such as the desire to benefit oneself at the cost of injustice to another, or, as it is said, "any wrong or indirect motive; some other motive than a desire to bring to justice a person whom the prosecutor honestly believes to be guilty":

Brown vs. Hawkes, 2 Q. B. 718;
Torsch vs. Dell, 88 Md. 468.

The Advice of Counsel to the effect that there was legal ground for the former prosecution, and the fact that in instituting that proceeding the present defendant relied and acted upon such advice, are facts which go to negative the existence of malice as a motive for the original proceeding. The advice relied upon must have been that of a reputable practitioner and given upon a full and honest disclosure of all facts within the client's knowledge, and must have been depended upon in good faith:

Stewart vs. Sonneborn, *infra*, p. 144;
Cooper vs. Utterbach, 37 Md. 315.

V. The Damage to be shown by the present plaintiff as resulting from the malicious prosecution must be such as is recognized by the law as damage; what is such damage is a question which, in certain of its aspects, is diversely answered by the various courts.

Any interference with the present plaintiff's liberty or property, and certain kinds of injury to his reputation, caused by a malicious prosecution, whether criminal or civil, will constitute legal damage. Undoubtedly the arrest of his person, in either a criminal or a civil proceeding, and the seizure of his property, as by an attachment, and the institution of proceedings in bankruptcy against him, whereby his credit is impaired, are legally damaging. Some authorities hold that, if the former proceeding involved a charge of misconduct against the defendant which would be actionable *per se* if made verbally out of court, such injury to the defendant's reputation will constitute the legal damage requisite to sustain an action for malicious prosecu-

tion: Bigelow, Torts, p. 223. The cases on this point are, however, few and do not very clearly establish the doctrine stated. An endeavor to procure the now plaintiff to be indicted upon a non-defamatory charge, as assault and battery, which did not result in an indictment or an arrest, is clearly not actionable:

Byne vs. Moore, 5 Taunton, 187.

Lord Holt, C. J.: There are three sorts of damages any one of which is sufficient to support this action. First, damage to his fame, if the matter whereof he be accused be scandalous; secondly, to his person, whereby he is imprisoned; thirdly, to his property, whereby he is put to charges and expences.

Savill vs. Roberts, 12 Mod. 208 (1698).

Whether the successful defendant in a civil action, not involving the restraint of his person, disturbance of his property or actionable injury to his reputation, may maintain an action for malicious prosecution, is a question

Which in England is settled in the negative, upon the ground that the costs taxed in favor of the successful party in the former action are the legal equivalent for the damage sustained by him; and

Upon which the American courts are divided, the majority holding that an action for malicious prosecution may be maintained on account of the expense and vexation of defending the former suit, for which losses the taxed costs are not proportionate compensation.

In the affirmative upon this point is

Pangburn vs. Bull, *infra*, p. 150.

In Maryland there can be no recovery unless there has been an arrest, a seizure of property, bankruptcy proceedings or the like:

Supreme Lodge vs. Unverzagt, *infra*, 152.

Malicious Abuse of Process. This is a grievance, resembling in nature malicious prosecution, but differing therefrom in these respects:

It lies although the former action may have been brought, not only upon probable cause, but admittedly upon proper grounds; and,

It is not necessary for the plaintiff to show that the former proceeding has terminated.

The essence of the tort is the wrongful and malicious use of legal process to accomplish an improper purpose, as by compelling the present plaintiff to surrender property or to do something else to which he is not legally obliged, or to injure him by the levy of an excessive or otherwise unwarranted attachment:

Grainger vs. Hill, *infra,* p. 153;
Zinn vs. Rice, *infra,* p. 156.

Morgan vs. Hughes, 2 Term Rep. 225. King's Bench (1788).

Hughes was a justice of the peace. Morgan and one Davies had a dispute concerning the ownership of certain sheep. In order to avoid the delay and expense of a law-suit, Davies reported the facts as he understood them to Hughes, and, without making any charge of crime against Morgan, requested the justice to examine witnesses and determine the question of title. Hughes, for some reason, chose to cause Morgan to be arrested, and for that purpose issued a warrant commanding a constable to make the arrest, in which warrant it was falsely recited that Morgan had been accused by several witnesses on oath of feloniously taking, detaining and shearing the sheep in order to disguise their identity. Under this warrant, Morgan was arrested and confined in jail for seven weeks, at the end of which period he was released. So far as appeared, no other or further action had been taken against him.

Morgan now sued Hughes for the cause of action just stated. The form chosen was, not trespass as for false imprisonment, but an action on the case as for malicious commitment, which grievance it was in the argument sought, but unsuccessfully, to distinguish from malicious prosecution. The declaration stated the facts substantially as they are set out above; it averred that

the defendant, acting as a justice of the peace, issued the warrant for the arrest of the plaintiff "falsely, unlawfully, willfully, wrongfully, injuriously, maliciously and without any charge or accusation having been made to him, the said defendant, . . . and without any reasonable or probable cause whatsoever;" and, after alleging the imprisonment of the plaintiff until a certain date, it went on, "when he, the said plaintiff, was released and discharged from his said imprisonment."

The defendant interposed a demurrer to the declaration, whereby he admitted all the facts alleged by the plaintiff, but raised the question, whether the case, as stated in the declaration, entitled the plaintiff to recover; and the case was decided on this demurrer. It was held that the declaration was insufficient, and the plaintiff could not recover, because:

1. The form of the action should have been trespass, and not case; and,

2. The declaration did not sufficiently show that the prosecution had terminated, the mere discharge of the plaintiff from imprisonment—which was all that was alleged—not being in itself and necessarily a termination of the proceeding.

ASHHURST, J.: The general distinction is this: Where the immediate act of imprisonment proceeds from the defendant, the action must be trespass, and trespass only; but where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy, because the injury is sustained in consequence of the wrongful act of that other. But here the act of imprisonment was by the defendant alone; for it can not be said to be the false imprisonment of the constable, who was bound to execute the warrant of a justice having competent jurisdiction; and, therefore, if it were not an imprisonment by the defendant, it was not an imprisonment by any person. But, where a person is committed to prison by the warrant of a justice without any accusation, some person is guilty of false imprisonment; and it must be the imprisonment of the justice, who is the immediate and not the remote cause of it.

BULLER, J.: The distinction between the actions of trespass and case has long been settled in the manner mentioned by my brother ASHHURST. The *gravamen* in the present case is that the defendant personally took and arrested the plaintiff illegally, and imprisoned him; this is false imprisonment, and is an immediate injury to the person of the plaintiff. It is stated in the record that the warrant was illegally granted; and it was never doubted but that, in such a case, trespass was the proper remedy.

But, even if an action on the case could be maintained here, this declaration cannot be supported. The grounds of a malicious prosecution are, 1st, That it was done maliciously; and, 2nd, Without probable cause. The want of probable cause is the gist of the action; but that is not stated here; for it should have been shown on the face of the record that the prosecution was at an end. Saying that the plaintiff was "discharged" is not sufficient; it is not equal to the word "acquitted," which has a definite meaning. Where the word "acquitted" is used, it must be understood in the legal sense, namely, by a jury on the trial. But there are various ways in which a man may be discharged from his imprisonment without putting an end to the suit. If, indeed, it had been alleged that he was discharged by the grand jury's not finding the bill, that would have shown a legal end to the prosecution. Neither is there any distinction between a malicious commitment and a malicious prosecution.

Stonehouse vs. Elliott, 6 T. R. 315. King's Bench (1795).

Mrs. Elliott's pocket was picked in a theater. She had some reason to suspect that Stonehouse was guilty of the crime; wherefore she laid hold of him and gave him in charge to a constable who was present. Stonehouse was taken to a police-station, where Mrs. Elliott persisted in her charge; but, after some examination, it appeared that she was mistaken, and the prisoner was released. He brought an action of trespass against his accuser. It was objected at the trial, on the facts appearing, that the form of the action was misconceived, and that it should have been case for making a malicious charge. It was held, however, that trespass was the proper action in such a case, the court citing Morgan vs. Hughes, and Samuel vs. Payne, 1 Douglas, 358.

The Antecedent Proceeding.

Lewin vs. Uzuber, 65 Md. 342 (1886).

A controversy having arisen between the plaintiff and the defendant concerning the boundary between their respective farms, the defendant built a fence upon the line which he conceived to be the true boundary. This fence the plaintiff, acting apparently in good faith and with some reason for his claim, moved back for eight or ten feet to the line which he contended to be the correct position. The plaintiff had also cut some trees standing upon the strip in dispute. The defendant went before a justice of the peace, an officer authorized by law to issue warrants of arrest on charges of crime, and executed a sworn complaint charging the plaintiff with having stolen the defendant's land, trees and fence-rails. Upon this com-

plaint, the magistrate issued and delivered to a constable for execution a writ reading thus:

"Whereas complaint hath been made before me, the subscriber, one of the justices of the peace of the said State in and for the said County, upon the information and oath of John H. Lewin, who charges John Uzuber [and others] with stealing and taking his rails and land and destroying his young timber. Mordecai Albon, J. P."

Upon the authority of this writ, the constable arrested Uzuber, and the latter was held for the action of the grand jury. No indictment against him was found, and the charge was dismissed by the Court. Thereupon Uzuber brought this action against Lewin for malicious prosecution, assuming that the proceedings recited constituted an arrest and prosecution. The court held, however, that as the supposed warrant of arrest was wholly void, there had been no valid proceedings against the plaintiff; whence it followed that he could not maintain an action for malicious prosecution, but his remedy was by an action of trespass for assault.

MILLER, J.: This is an action for malicious prosecution. * * * The case was tried before a jury upon issue joined on the plea of not guilty, and the result was a verdict and judgment for the plaintiff, from which the defendant has appealed. * * * One of the questions presented by the exception is, was there any evidence offered at the trial legally sufficient to authorize the jury to find that the magistrate ever issued or signed any paper which the law can recognize as a *warrant* or *writ* for the arrest of the plaintiff? This is a question vital to the case, for we take it to be clear that the plaintiff, though he may have a remedy against all parties concerned therein for the wrong done him by this arrest, in an action of trespass for a false imprisonment, cannot maintain this action on the case for a malicious prosecution, without proving the averment of his declaration, that the defendant caused him "to be arrested by a *writ* issued by" the magistrate. What then is the proof in the record on the subject? * * * A careful consideration of the same has convinced us there is nothing in it legally sufficient to justify a jury in reaching any other conclusion, than that the paper of which Exhibit A purports to be a copy, was in fact, the paper and the only paper which was issued by the magistrate as and for a warrant or writ for the arrest of the plaintiff. * * *

Taking then this as the paper which was signed by the magistrate and delivered to the constable, it is impossible for the Court to recognize it as a warrant or writ. It contains no command to arrest and is simply the recital of a charge made on oath by the defendant against certain

parties named. As a warrant or writ for the arrest of these parties, or any one else, it is totally void on its face, and affords no protection whatever either to the constable who acted under it or the magistrate who issued it. In Grumon vs. Raymond, 1 Conn. 40, there was a search-warrant which commanded the officer to search the premises of certain named parties for two stolen bags, and also to search "other suspected places, houses, stores, or barns," in the town of Welton, "for said bags, and also to search such persons as are suspected; and if you shall find said bags and the person suspected, you are to take said bags and arrest the person suspected and have him forthwith before me." A party who was arrested under this writ brought an action of trespass *vi et armis* against both the magistrate and the constable, and both were held liable. The Court, as might have been expected, denounced such a writ in very vigorous terms as wholly illegal and void on its face; and in speaking of the liability of the constable, laid down the law, . . . "although an officer is not always liable when he executes an improper warrant, yet this is in a case where it does not appear on the face of the warrant that it is illegal. It may, for anything that the officer can discover, be legal; and in such case it is his duty to obey and to presume that it is lawful. But an officer is bound to know the law, and when the warrant on the face of it appears to be illegal, and he executes it, he is liable to the person arrested." In that case the warrant commanded the arrest of any and every suspected party, while in this it commands the arrest of no one. The illegality of it as a writ is much more apparent upon the face of this paper than it was upon that, and if the warrant afforded no protection either to the officer or magistrate in that case, this paper can certainly afford them none in this.

This being so, it follows very clearly, we think, that the plaintiff can not maintain this action. The distinction between an arrest by an officer under a warrant legally issued and coming to his hands in a lawful manner, and one made without warrant, or under process from a Court having no authority to issue it, is clearly drawn. Under the former he can commit no trespass by executing it according to its command. If he arrests the person he is ordered by it to arrest, he is fully protected, and no action for trespass lies against him for this discharge of his duty. If, on the contrary, he seizes the person of another, without warrant, or with one palpably illegal, or issued without the authority of law, he commits a trespass for which he and his abettors are liable in damages.

Hence the distinction at common law between the action for false imprisonment and that for malicious prosecution. The former is a suit for trespass, and the latter an action on the case. The first can be maintained only when the arrest is made without legal process; and the latter, when the process of the law has been perverted and improperly used without probable cause and for a malicious purpose. In both cases the injured party can recover damages for the wrong done him, but he must proceed in a different way against different parties, and make different allegations in the one case from what he does in the other. In malicious prosecution the officer issuing the process or making the arrest under it, incurs no liability; the whole responsibility is upon the party procuring

it. In false imprisonment, the arresting officer, and the party inducing the arrest, and the magistrate assuming to issue the unauthorized warrant, are all liable as joint trespassers. In the former, malice and want of probable cause must be alleged; in the latter, neither is a necessary averment, but probable cause may go in mitigation of damages, though not in bar of the action.

It must, however, be distinctly understood, that in what we have thus said in regard to the invalidity of this paper as a warrant, we do not hold that any formal defect or irregularity, even though appearing on its face, will be sufficient to vitiate such a writ, and render the magistrate or constable liable in damages for issuing it or acting under it. On the contrary, the defect must be so glaring and palpable that any person of ordinary intelligence, by merely looking at and reading it, will at once pronounce it null and void, and of no effect as a warrant. Such is clearly the character of the defect in the instrument. Any one, even of the plainest understanding, can see at once that a paper which contains no precept or mandate to arrest any one is not a writ authorizing an arrest . . . , and it follows that the plaintiff has offered no legally sufficient evidence of an arrest under a warrant as alleged in his declaration. As this goes to the root of the case, and the right to maintain this action for malicious prosecution, the consequence is that the judgment must be reversed.

Auerbach vs. Freeman, 43 App. D. C. 176 (1915).

Auerbach, finding that some articles had been stolen from his office, complained to a police officer. A little later Auerbach discovered one of the missing articles in the room of Freeman, the janitor of the building, and this fact he reported to two detectives. These officers went to Freeman's room, found the articles there, and at once, without any warrant, arrested Freeman, who was taken to a station-house. Auerbach, however, declined to swear to any charge, and Freeman was shortly released without bond and apparently upon his engagement to appear in the police court when wanted. He did appear in that court on two occasions, but no charge was ever filed against him and no record of the case was ever made, and after his second appearance he was allowed to go without day.

Freeman sued Auerbach for malicious prosecution and obtained a judgment in the trial court. The judgment, however, was reversed, for the reason that, since no criminal proceeding had been instituted, the plaintiff could not maintain an action for malicious prosecution, but his remedy, if he had any, was an action for false imprisonment.

ROBB, J: The question with which we are confronted is whether there was any basis for this action. According to Bouvier, malicious prosecution or malicious arrest imports a wanton prosecution or arrest, made without cause, "by a *regular* process and proceeding, which the facts did not warrant, as appears by the result." There is a difference between a false imprisonment, which means an imprisonment made without any process whatever, or under color of process wholly illegal. Newell on

Malicious Prosecution, p. 8, says: "The terms 'malicious prosecution' or 'malicious arrest' always in law suppose regular process or proceedings, but that the facts did not warrant their issuing, and which is to be decided by the result." * * *

In Lewin vs. Uzuber, 65 Md. 341, an action for malicious prosecution, a magistrate, at the instigation of the defendant, issued a paper upon which the plaintiff was arrested, and which the Court of Appeals was unable to recognize "as a warrant or writ," holding its illegality to be so apparent upon its face that it afforded one making the arrest no protection. "That being so," said the Court, "it follows very clearly, we think, that the plaintiff cannot maintain this action." . . .

In the present case, according to the evidence for the plaintiff, the arrest was for a petit larceny and without a warrant having issued. In other words, under the facts stated, it was entirely without legal justification. No complaint was ever filed against the plaintiff, and there are no papers on file in the police court relating to the matter. How then can it possibly be contended that there has been a prosecution of the plaintiff? He has been arrested, it is true, and threatened with a prosecution, but that is not enough to form the basis of this action. . . . Here no criminal proceeding was instituted, and therefore there has been no prosecution, malicious or otherwise.

Termination of the Proceeding.

Parker vs. Langly, 10 Modern, 209. King's Bench (1714).

PARKER, Chief Justice, delivered the resolution of the court to be that the declaration [for malicious prosecution] was naught for want of showing what became of the former action; whereas it ought to have been shown that it was false and hopeless. As the declaration now stands, the first may either be determined, or it may be deserted, or it may still be going on; and *non constat* which of these three is the matter of fact. If the first, *non constat* whether determined for or against the plaintiff; if for the plaintiff [in the former action], then there is no color for this action. If the second were the matter of fact, desertion is an indication of its being false and hopeless, and then indeed this action would be maintained. * * * If the third be the matter of fact, then this action is brought too soon. In the reign of Richard the Third [Y. B. 2 Rich 3, A. D. 1484] it was held by all the judges that the first action must be first determined, because *"non intelligitur,"* says the book, *quousque terminetur* that the action was unjust. No man can say of an action still depending that it is false or malicious.

The same rule holds in criminal cases. In an action for a malicious indictment, the plaintiff must in his declaration show what became of the indictment. A verdict, or a plea in bar admitting and confessing the first action to be false and hopeless, may cure this defect in a declaration. * * * Judgment was given for the defendant [on demurrer to the declaration].

Fisher vs. Bristow, 1 Douglas, 215. King's Bench (1779).

Action for a malicious prosecution (for incest) in the Ecclesiastical Court of the Archdeaconry of Huntington. Demurrer to the declaration, and cause assigned, that it was not stated how the prosecution was disposed of, or that it was not still depending. The court were clearly of the opinion that the objection was fatal, and said it was settled that the plaintiff in such an action must show the original suit, wherever instituted, to be at an end; otherwise he might recover in the action and yet be afterwards convicted on the original prosecution. Judgment for the defendants.

Simmons vs. Sullivan, 42 App. D. C. 523 (1914).

Sullivan, a police officer, swore to an information charging that Simmons had obstructed a street with building materials in violation of the municipal police regulations. On this charge Simmons was arrested, appeared in the police court, and moved to quash the information, which motion was granted, the information was quashed, and Simmons was discharged. Before he left the Court, however, Simmons was notified that a new information would at once be filed; and on the same day the corporation counsel filed an information, which was sworn to by Sullivan, charging Simmons with obstructing the same street with building materials, which act now was alleged to be in violation of the municipal building regulations. No warrant was issued on this second information and Simmons was never brought to trial; and when this action was brought, the second or amended case was still pending in the police court, the accused having taken no steps to have it either tried or dismissed.

Simmons now sued Sullivan for malicious prosecution. Upon the proof of the facts just stated, the jury were instructed to return a verdict for the defendant; and the Court of Appeals approved this action, on the ground that the prosecution in the Police Court was not terminated, the second information being virtually a continuation of the proceeding instituted by the original information.

VAN OSDEL, J.: The new information was filed to correct defects in the original information, which was quashed on the motion of plaintiff. It was therefore a continuation of the original complaint. * * * In Schippel vs. Morton, 38 Kan. 567, 16 Pac. 804, where a criminal prosecution had been commenced before a justice of the peace, and dismissed to bring it in the district court, and on the same day it was so commenced, it was held that an action for malicious prosecution, based on the suit in the justice court, which was brought while the action in the district court was still pending, could not be sustained.

The fact that in one information the plaintiff was charged with violating the police regulations, and in the other with violating the building regulations, is not important. The same facts furnished the basis for each complaint, and each was dependent upon the same proof. In the case of Gaiser vs. Hurleman, 74 Ohio St. 271, 113 Am. St. Rep. 953, 78 N. E. 372, Gaiser filed an affidavit charging Hurleman and others with the crime of blackmail. The justice bound the defendants over to the Court of Common Pleas, where at the next term the grand jury indicted them for assault with intent to commit robbery. Hurleman commenced an action against Gaiser for malicious prosecution on account of the action before the justice, whil the indictment against him and the others was still pending. The court, holding that the indictment was a continuation of the criminal prosecution started before the justice of the peace, said: "The two indictments had a common root. Gaiser, on appearance before the grand jury, furnished the facts from which both indictments sprang. The dual form of the charge was at the instance, no doubt, of the counsel for the State." * * *

It must be remembered that at all times the prosecution of the plaintiff was under the supervision of the corporation counsel of the district; and, where a prosecutor, with reasonable diligence, follows up the dismissal of a defective indictment or information with a new one, his action negatives an intention on his part to discontinue the prosecution, and the new indictment on information will be considered as merely a continuance of the prosecution. Hartshorn vs. Smith, 104 Ga. 235, 30 S. E. 666; Newell, Malicious Prosecution, 331.

It is settled law that, before an action for damages for malicious prosecution can be maintained, it must appear that the criminal prosecution which is the basis of the action in tort has terminated. It is incumbent on the plaintiff in the civil suit to allege and affirmatively prove a discharge and termination of the criminal proceeding; and if it appears that the criminal prosecution has not finally terminated, it will furnish sufficient ground for the abatement of the civil action."

Mellor vs. Baddeley, 2 Crompton & M. 675. Exchequer (1834).

Baddeley and another person having charged Mellor before a justice of the peace with an offence under the game laws, the

accused was convicted by the justice and sentenced to pay a fine and costs amounting to £3, 10s, and in default of such payment to be imprisoned for two months. Mellor was unable to pay the fine, or to find the sureties who were requisite to enable him to appeal from the conviction, and was therefore obliged to undergo the imprisonment. After being released from jail, he brought this action against his accusers for malicious prosecution, his declaration alleging that they had falsely and maliciously, and without probable cause, charged him with the violation of law, and had maliciously and without probable cause procured the magistrate to convict and commit him. At the trial of this action the defendants produced the conviction of the plaintiff; and, as that was unreversed or vacated, the trial court was of opinion that the action could not be maintained, and so non-suited the plaintiff. On motion for new trial, the Court *in banc* held that the non-suit was proper.

VAUGHAN, B.: The simple question is, whether the conviction unreversed must of necessity be an answer to the action, as showing probable cause for laying the information complained of? It is unnecessary to refer to many cases, but there is one of Whitworth vs. Hall, 2 B. & Adol. 695, which is direct to the point. That was an action against a party for maliciously suing out a commission of bankruptcy, which was not proceeded in, and therefore not brought to an end. There LORD TENTERDEN said: "An action cannot be supported for maliciously holding to bail without showing that the proceedings were at an end; and yet the discharge from arrest is in the discretion of the court." And LITTLEPAGE, J., added: "There is no distinction between the action for malicious prosecution by indictment, or for malicious arrest, and one for maliciously suing out a commission of bankrupt. In all of them it is necessary to show that the original proceeding which formed the alleged ground of the action is at an end." In this case, the conviction under 1 and 2 Wm. 4, c. 32, being summary, section 44 gives to the party convicted an appeal from it to the quarter sessions, provided he gives the complainant a notice in writing within three days after such conviction, and shall also either remain in custody till the sessions, or within such three days enter into a recognizance to appear and try such appeal. The plaintiff in this case neither gave notice of appeal nor entered into such recognizance, but suffered the punishment awarded on the conviction. Therefore, as he acquiesced in it, there was evidence of probable cause.

Probable Cause.

Wheeler vs. Nesbit, 24 How. 544. Supreme Court of the United States (1860).

About eight o'clock in the evening of a certain day in 1856, Wheeler, with two other persons, arrived at a town in Tennessee, all the three being indifferently clad, and the party bringing with them four fine horses. Wheeler was a resident of Kentucky, and the two other men were strangers in the town; and two of the company were riding each with a sack and a blanket in place of a saddle. On account of the appearance of the party, and perhaps of other circumstances, they were suspected of having stolen the horses, and Nesbitt and the other defendants went before a justice of the peace and procured the issue of warrants upon which Wheeler and his associates were arrested upon the charge of larceny. The prisoners were held in confinement for a week, at the end of which period they obtained satisfactory evidence of their good character and were discharged. Wheeler then brought this action for malicious prosecution against the persons who had caused his arrest.

At the trial the plaintiff was unable to adduce any evidence of express malice on the part of the defendants. It was shown in defence that there was some reason to suspect the plaintiff of horse-stealing. The judge instructed the jury that, in order to excuse the defendants, it must appear either that they had probable cause for prosecuting the plaintiff or that they acted in good faith and without malice. The verdict was in favor of the defendants. *Held*, that the direction given to the jury was "quite as favorable to" the plaintiff "as the well-settled rules of law upon the subject would possibly allow."

CLIFFORD, J.: To support an action for a malicious criminal prosecution, the plaintiff must prove, in the first place, the fact of prosecution, and that the defendant was himself the prosecutor, or that he instigated its commencement, and that it finally terminated in his acquittal. He must also prove that the charge preferred against him was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice. Proof of these several facts is indispensable to support the declaration, and clearly the burden of proof in the first instance is upon the plaintiff to make out his case; and if he fails to do so in any one

of these particulars, the defendant has no occasion to offer any evidence in his defence. Undoubtedly, every person who puts the criminal law in force maliciously, and without any reasonable or probable cause, commits a wrongful act; and if the accused is thereby prejudiced, either in his person or property, the injury and loss so sustained constitute the proper foundation of an action to recover compensation.

Malice alone, however, is not sufficient to sustain the action; because a person actuated by the plainest malice may nevertheless prefer a well founded accusation, and have a justifiable reason for the prosecution of the charge. Want of reasonable and probable cause is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecutor to make the accusation; and, though the averment is a negative one in its form and character, it is nevertheless a material element of the action, and must be proved by the plaintiff by some affirmative evidence, unless the defendant dispenses with such proof by pleading singly the truth of the several facts involved in the charge; Morris vs. Corson, 7 Cowen, 281. Either of these allegations may be proved by circumstances, and it is unquestionably true that want of probable cause is evidence of malice, but it is not the same thing; and unless it is shown that both concurred in the prosecution, or that the one was combined with the other in making or instigating the charge, the plaintiff is not entitled to recover in an action of this description. * * * Accordingly, it was held in Foshay vs. Ferguson, 2 Denio, 619, that even proof of express malice was not enough without showing also the want of probable cause; and the court went on to say that, however innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show that he had reasonable grounds for believing him guilty at the time the charge was made. Similar views were expressed also in Stone vs. Crocker, 24 Pick. 83. There are two things, say the court in that case, which are not only indispensable to the support of the action, but lie at the foundation of it. The plaintiff must show that the defendant acted from malicious motives in prosecuting him, and that he had no sufficient reason to believe him guilty. If either of these be wanting, the prosecution must fail; and so are all the authorities from a very early period to the present time; Golding vs. Crowle, Sayer, 1; Farmer vs. Darling, 4 Burrow, 1974; 1 Hilliard on Torts, 460.

It is true, as before remarked, that want of probable cause is evidence of malice for the consideration of the jury; but the converse of the proposition cannot be sustained. Nothing will meet the exigencies of the case, so far as respects the allegation that probable cause was wanting, except proof of the fact; and the *onus probandi*, as was well remarked in the case last referred to, is upon the plaintiff to prove affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no reasonable ground for commencing the prosecution; Purcell vs. MacNamara, 9 East. 361; Wilans vs. Taylor, 6 Bingham, 184; Johnstone vs. Sutton, 1 Term, 544; Turner vs. Ambler, 10 Q. B. 2557.

Foshay vs. Ferguson, 2 Denio, 617. New York (1846).

Ferguson owned a farm near Rome, which was managed by one Lambert. Foshay passed this farm with a drove of cattle, and on the next day Lambert discovered that a number of Ferguson's cattle were missing. Following Foshay's drove Lambert picked up all but two or three of the missing animals; and, also, he learned that a neighbor named Gage had missed some of his cattle, which had been found in Foshay's drove, and which Foshay had given up on Gage's demand. It was said, too, that Foshay had even paid Gage some money on account of the matter. Lambert reported these facts to his employer, whereupon they followed Foshay to a point about seventy miles from Rome, where Ferguson found two of his beasts in Foshay's drove. On being asked what he had paid for these animals, Foshay said that he could not tell because they had been bought by his partner. Ferguson then declared that the cattle were his, charged Foshay with stealing them, and said he had a warrant for Foshay's arrest, and would take him back to Rome. Foshay said that he had never before been caught in such a scrape, and proposed a settlement; since "he had gotten his foot in, he must get out as well as he could." Accordingly Foshay paid Ferguson $200 in cattle and $10 in money, and Ferguson gave the other a bill of sale for the two beasts lost, which were worth about $10.

Returning home, Ferguson told of the transaction and expressed the opinion that his cattle had been stolen. Foshay heard of this charge and brought a suit against Ferguson for slander on account of the charge of theft, and also an action of trover to recover the value of the cattle which Ferguson had received in the settlement. Ferguson thereupon caused Foshay to be indicted on the charge of stealing the cattle. Foshay was tried on this charge, and acquitted. He then brought the present action against Ferguson for malicious prosecution in procuring the indictment, at the trial of which action the facts were developed as they have been stated. *Held,* that the plaintiff was not entitled to recover; because though the defendant was clearly actuated by malice in causing Foshay to be indicted,

there was clearly probable cause for supposing him guilty of larceny.

BRONSON, C. J.: There was evidence enough in the case to warrant the jury in finding that the defendant set the prosecution in motion from a bad motive. But all the books agree that proof of express malice is not enough without showing also the want of probable cause. Probable cause has been defined, a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence with which he is charged; Munns vs. Nemours, 3 Wash. C. C. 37. However innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show that he had reasonable grounds for believing him guilty at the time the charge was made. In Swain vs. Stafford, 3 Iredell, N. Car. 289, and 4 *id.* 392, the action was against the defendant, who was a merchant, for charging the plaintiff with stealing a piece of ribbon from his store. At the time the complaint was made, the defendant had received such information as induced a belief of the plaintiff's guilt; and, although it afterwards turned out that the property had not been taken by any one, and was never out of the defendant's possession, it was held that an action for malicious prosecution could not be supported.

The doctrine that probable cause depends on konwledge or information which the prosecutor had at the time the charge was made, has been carried to a great length. In Delegal vs. Highley, 3 Bingham's New Cases, 950, which was an action for maliciously and without probable cause procuring a third person to charge the plaintiff with a criminal offence, the defendant pleaded specially, showing that the plaintiff was guilty of the offence which had been laid to his charge; and the plea was held bad in substance because it did not show that the defendant, at the time the charge was made, had been informed or knew the facts on which the charge rested. The question of probable cause does not turn on the actual guilt or innocense of the accused, but upon the belief of the prosecutor concerning such guilt or innocence; Seibert vs. Price, 5 Watts & Serg. 438.

Without going into a particular examination of the evidence in this case, it is enough to say that the defendant, at the time he went before the grand jury, had strong grounds for believing that the plaintiff had stolen the cattle; and, so far as appears, not a single fact had then come to his knowledge which was calculated to induce a different opinion. Although the plaintiff was in fact innocent, there would be no color for this action if it were not for the fact that the defendant settled the matter with the plaintiff, instead of proceeding against him for the supposed offence. If the parties intended that the settlement should extend so far as to cover up and prevent a criminal prosecution, the defendant was guilty of compounding a felony. And the fact that he made no complaint until the plaintiff commenced the two suits against him, goes far to show that he was obnoxious to that charge. But however culpable the defendant may have been for neglecting his duty to

the public, that cannot be made the foundation of a private action by the plaintiff. Although the defendant may have agreed not to prosecute, and the complaint may have been afterwards made from a malicious feeling towards the plaintiff, still the fact of probable cause remains; and so long as it exists, it is a complete defence. There is enough in the defendant's conduct to induce a rigid scrutiny of the defence. But if upon such scrutiny it appears that he had reasonable grounds for believing the plaintiff guilty, and there is nothing to show that he did not actually entertain that belief, there is no principle upon which the action can be supported.

Boyd vs. Cross, 35 Md. 194 (1872).

Boyd presented to the paying teller of the Commercial and Farmers' Bank a check purporting to be drawn in favor of Boyd by Cox & Brown, a well-known firm of commission merchants. Boyd was unknown to the bank, and Cox & Brown had no account there; and the amount specified in the body of the check was different from that written in the margin. The teller mentioned this discrepancy to Boyd, saying that there was something odd about it, to which observation Boyd answered that he, too, thought so, but produced a letter addressed to himself in which he said he had received the check. The teller turned the check over to Cross, who was the cashier of the bank. Cross called a police officer, who, after talking with Boyd, took him in custody and escorted him to the business house of Cox & Brown. There one of the firm pronounced the check a forgery; but he added that he had for many years known Boyd as an honest man and did not believe him guilty of any wrongdoing in the matter. The officer reported these facts to the bank, arrested Boyd and lodged him in jail on the charge of attempting to utter a forgery. Boyd was released on bail on the next day, and afterwards the charge against him was ignored by the grand jury, it appearing that the check had been forged by another person.

Boyd then sued Cross for malicious prosecution. Upon the facts shown it was held that the defendant was not liable, his conduct in the transaction not affording any evidence of malice, and the circumstances of the case affording reasonable grounds of suspicion that the plaintiff had been guilty of forgery.

ALVEY, J.: * * * To have entitled the plaintiff to recover for malicious prosecution it was incumbent upon him to prove affirmatively, that he had been prosecuted, or that a prosecution had been instigated, by the defendants, or one of them; that such prosecution had terminated in his discharge or exoneration from the accusation against him; and that such prosecution was both malicious and without probable cause on the part of the defendants. All of these propositions must concur, and be established by the plaintiff, to entitle him to maintain his action. If the evidence adduced be legally insufficient to be submitted to the jury to prove each and all of these elements of the plaintiff's case, his action could well be pronounced groundless, and the defendant not be called on for his defense: Turner vs. Walker, 3 G. & J. 377.

Malice is a question of fact for the jury, and its existence may be, and generally is, inferred from the want of probable cause for the prosecution; but it does not necessarily follow that, because there is an absence of probable cause, the defendant must have been actuated by malice. The presumption of malice, resulting from the want of probable cause, is only *prima facie*, and may be rebutted by the circumstances under which the defendant acted. But from the most express malice, the want of probable cause cannot be implied.

The want of probable cause is a mixed question of law and fact. As to the existence of the facts relied on to constitute the want of probable cause, that is a question for the jury; but what will amount to the want of probable cause in any case, is a question of law for the court. The jury, in our practice, are always instructed hypothetically as to what constitutes probable cause, or the want of it, leaving to them to find the facts embraced in the hypothesis.

What will amount to such combination of malice and want of probable cause, as will entitle a party to maintain an action, says CHIEF JUSTICE TINDAL, in Williams vs. Taylor, 6 Bing. 183, is so much a matter of fact in each individual case, as to render it impossible to lay down any general rule on the subject; but there ought to be enough to satisfy a reasonable man that the accuser had no ground for proceeding but his desire to injure the accused. Perhaps the most accurate definition of probable cause is that given by JUDGE WASHINGTON, in Munns vs. Dupont, 3 Wash. C. C. 31, as being such reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man in believing the party accused to be guilty.

In this case, however innocent the plaintiff may have been of any intention to defraud either the bank or the parties whose names were forged, the presentation of the check, under all the circumstances, was well calculated to excite suspicion. The plaintiff was a stranger at the bank; and the bank was not the proper place to obtain information in regard to the genuineness of the check, or, if genuine, the circumstances under which it was drawn. The house of the firm whose name was forged, was but a short distance off, and was well known to the plaintiff; and it naturally struck the bank officers as strange that the plaintiff did not apply there for information instead of presenting the check at the bank. * * * Cross, the defendant, did not pursue the prosecution further than to place the matter in the hands of the officers of the law. He never appeared as a witness, either before the magistrate or the grand jury. * * * In his conduct we can perceive no evidence of malice whatever. Nor can we discover in all the facts of the case evidence of the want of probable cause On the contrary, we think any reasonable man acting in the capacity of the defendant, Cross, and looking as well to the protection of the bank as to the good of the public, would likely have done as the defendant in this case did.

Mark vs. Rich, 43 App. D. C. 182 (1915).

Rich had undertaken to publish a book, to be called the Automobile Register, in which were to be included a large number of advertisements. In contracting with those who agreed to advertise in the book, he promised to send out by mail six thousand copies of the work, the postage to be paid by himself, and that payment should not be demanded from the advertisers until the book should be published and distributed. Mark agreed to insert an advertisement upon these terms, and a firm composed of Hooven and Miller contracted in like manner. The book was published, but the copies to be mailed were not sent out nor was the edition otherwise distributed as had been promised; and Rich wrote a note to Mark saying that he, Rich, was unable to pay the postage necessary to mail six thousand copies, that he was going out of town for two weeks, and that Mark should "consider the Automobile Register incident closed between us."

Rich had already collected a considerable sum of money from advertisers on account of the publication. Among these were Hooven and Miller, from whom, a few days before the date of his letter to Mark, Rich had collected payment for their advertisement, on which occasion—as it was testified, and as it had been reported to Mark—he had represented that the book had theretofore been distributed, and had obtained the payment on the strength of that representation. Mark, hearing of this fact, accompanied Miller to the office of the District Attorney where the two visitors laid the facts before one of that officer's assistants. There was some other testimony tending to show that Mark had somewhat actively interested himself in procuring Rich to be prosecuted and had been the principal influence in inducing Miller to make complaint to the District Attorney's office.

The prosecuting officer to whom the matter was reported announced that he would authorize the issue of a warrant for the arrest of Rich if Miller would swear to an information charging the facts related by him. Accordingly Miller executed such an affidavit, and a warrant was issued under which Rich was arrested, and afterwards arraigned in the Police Court, on a charge of obtaining money by false pretences. Before the case was brought on to a hearing, Rich made some kind of a settlement which was satisfactory to those concerned; and this fact being reported to the District Attorney, that officer entered a *nolle prosequi* in the case.

Thereupon Rich brought this action against Mark, assuming that the conduct of the defendant in relation to the complaint of Miller constituted malicious prosecution. At the trial, the case being proved as here stated, the defendant requested the court to say to the jury, in effect, that they should return a verdict for the defendant if they found a series of specified facts, being those acts and declarations of Rich indicative of a fraudulent intent which have been recounted. The purpose of this request was to procure a ruling of the court that those acts and declarations amounted to probable cause for believing Rich guilty of obtaining money by false pretences, thus making it necessary for the

jury to find in favor of Mark if they found the facts specified. The court refused so to direct the jury, preferring to leave it to them to say whether or not the conduct of Rich, as that conduct appeared, did or did not afford probable cause for believing him guilty of the crime charged against him. The jury found for the plaintiff, who therefore obtained a judgment. This judgment was reversed by the Court of Appeals, which held:

That the trial court erred in failing to instruct the jury as to what facts would constitute probable cause, leaving to them only to find whether or not such facts were proven; and,

That the facts specified in the instruction proposed by the defendant would, if proven to the satisfaction of the jury, constitute probable cause, and the jury should have been told so.

SHEPARD, C. J.: The court erred in failing to instruct the jury what facts would constitute probable cause for the prosecution. The want of probable cause is a mixed question of law and fact. As to the existence of the facts relied on to constitute the want of probable cause, that is a question for the jury; but what will amount to the want of probable cause in any case is a question of law for the court. The jury are always instructed hypothetically as to what constitutes probable cause, or the want of it, leaving to them to find the facts embraced in the hypothesis. . . .

Probable cause for a criminal prosecution lies in the existence of such facts and circumstances as would reasonably excite the belief in the mind of an ordinary cautious man, acting on the facts and circumstances within the knowledge of the prosecutor at the time, that the accused was guilty of the crime charged.

And, if there be this probable cause, the motives which may have actuated the prosecutor in commencing and carrying on the prosecution are immaterial.

Where the facts tending to show want of probable cause are in dispute, their existence is for the determination of the jury; but their effect when found is a question for the determination of the court; Spitzer vs. Friedlander, 14 App. D. C. 556; Brown vs. Selfridge, 34 App. D. C. 242; s. c. 224 U. S. 189; Stewart vs. Sonneborn, 98 U. S. 187; Boyd vs. Cross, 35 Md. 194.

We think the court should have instructed the jury that, if they believed that, at the time of the institution of the prosecution, there were such facts and circumstances as would reasonably excite the belief in the mind of the defendant that the accused was probably guilty of the crime charged, that this would constitute probable cause. If defendant believed that plaintiff had procured money from Hooven and Miller upon the representation that the Automobile Register had been actually distributed at the time of the collection, and that this fact was untrue, then he would be warranted in inducing Miller to make the complaint.

It was for the jury to say whether the plaintiff made those representations to Miller, and Miller reported the facts to the defendant, who induced him to make the complaint.

Probable cause, too, would exist if all the facts were made known to the prosecuting attorney, at the time, and upon them he advised the prosecution.

Malice.

Mitchell vs. Jenkins, 5 B. & Adolph, 588. King's Bench (1883).

Mitchell was indebted to Jenkins, on account of tithes, to the amount of £45, against which Mitchell claimed a set-off of £16, 5s., the validity of which was in dispute between the parties. Jenkins demanded by letter the payment of the £45, offering to allow the set-off if it should be produced and shown to be correct. Receiving no answer to this letter, Jenkins sued Mitchell for £45, and caused the issuance of a warrant whereon Mitchell was arrested, it being at that time usual to arrest the defendant in an action for a debt and to imprison him pending the suit unless he gave bail to secure the payment of the amount claimed if the plaintiff should obtain judgment therefor. In the case stated, Mitchell gave bail. Afterwards Jenkins' attorneys offered to discontinue the action if Mitchell would pay the £45 less the amount claimed by him as set-off. This he declined to do, and shortly thereafter Jenkins discontinued his suit and paid the costs.

Mitchell thereupon brought the present action, alleging malicious arrest in the former. At the trial, he proved that he was entitled to a set-off of £16, 5s., against his indebtedness to Jenkins. Counsel for Jenkins insisted that he was entitled to a verdict if the jury should be of opinion that he had acted in good faith and under a mistake of law. On the other side, it was contended, upon the authority of Bromage vs. Prosser, 4 B. & C. 247, that the arresting of Mitchell for a larger sum than was due from him was an unlawful act from which malice in law was of necessity to be inferred, whence it resulted that the jury had nothing to say as to the question of malice. TAUNTON, J., who tried the case, held with the plaintiff upon this point, and that the only question for the jury was the amount of damages. On motion for new trial, this ruling was held to be erroneous, and the true rule was stated to be that

malice must be found as a fact by the jury, TAUNTON, J., agreeing with the other members of the court that he had been mistaken in the law on this subject.

DENMAN, C. J.: Every arrest by a creditor for more than is due is, in some sense, a wrongful act. By statute, if it be made without reasonble or probable cause, though with an entire absence of malice, the party arresting may be deprived of his costs; and at common law, if the party arrested has suffered damage to a greater extent than those costs, he may, if the arrest was also made maliciously, bring his action on the case. In that action, however, it is still incumbent on the plaintiff to allege and prove malice as an independent fact; though it may in some instances be fairly inferred by the jury from the arrest itself, and the circumstances under which it is made, without any other proof. They, however, are to decide; as a matter of fact, whether there be malice or not, I have always understood the question of reasonable or probable cause on the facts found to be a question for the opinion of the court, and malice to be altogether a question for the jury. Here, the question of malice having been wholly withdrawn from the consideration of the jury, there ought to be a new trial.

PARKE, J.: I can conceive a case, where there are mutual accounts between parties, and where an arrest for the whole sum claimed by the plaintiff would not be malicious; for example, the plaintiff might know that the set-off was open to dispute, and that there was reasonable ground for disputing it. In that case, though it might afterwards appear that the set-off did exist, the arrest would not be malicious. The term "malice" in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives. That would not be the case where, there being an unsettled account, with items on both sides, one of the parties, believing *bona fide* that a certain sum was due him, arrested his debtor for that sum, though it afterwards appeared that a less sum was due; nor where a party made such an arrest, acting *bona fide* under a wrong notion of the law and pursuant to legal advice.

TAUNTON, J.: At the trial I acted upon the decision in Bromage vs. Prosser, 4 B. & C. 247. That was an action of slander, and it was held that, although malice was the gist of the action, there were two sorts of malice—malice in fact and malice in law; the former denoting an act done from ill-will towards an individual, the latter a wrongful act intentionally done without just cause or excuse; and that, in ordinary actions for slander, malice in law was to be inferred from the publishing the slanderous matter, the act itself being wrongful and intentional, and without any just cause or excuse; but that, in actions for slander *prima facie* excusable on account of the cause of publishing the slanderous matter, malice in fact must be proved. It appeared to me that the present defendant, Jenkins, having sued out a bailable writ for £45, knowing that there was a set-off to the amount of £16 5s., had

been guilty of a wrongful act, and therefore that malice in law ought to be presumed. It struck me that there was no distinction, in this respect, between an ordinary action for slander and an action for malicious arrest; but I am now satisfied that, in this latter form of action, malice is a question of fact, which ought to be left to the jury.

Stewart vs. Sonneborn, 98 U. S. 187. Supreme Court of the United States (1878).

Sonneborn was a member of the firm of Leipzeiger & Co., a New York concern which dealt with A. T. Stewart & Co., also of New York. In 1866 Sonneborn withdrew from the Leipzeiger firm, but notice of that fact was not published, and the firm continued business under the same name. In 1867 Leipzeiger & Co. bought goods from Stewart & Co., for which payment was not made; and in 1869 Stewart & Co. sued Sonneborn in Alabama, where he then resided, for the price of these goods. The first trial of this case resulted in a judgment for Sonneborn, but this judgment was reversed and a new trial ordered by the Supreme Court of Alabama. In May of 1873, after this reversal and before the case had come on for a second trial, a brother of Sonneborn sued him in an Alabama Court and recovered judgment against him for about $7,000, Sonneborn making no defence and the judgment being taken by default. This fact becoming known to Stewart & Co., they consulted eminent counsel in Alabama, who advised that Sonneborn, in suffering a judgment by default, had committed an act of bankruptcy. On this advice Stewart & Co. instituted proceedings in bankruptcy against Sonneborn, which resulted in his being declared a bankrupt, and the seizure of his goods by an assignee for the benefit of his creditors. A few weeks afterward, the suit of Stewart & Co. on account of the Leipzeiger indebtedness was brought to a second trial, and again there were a verdict and judgment for the defendant, which judgment was affirmed by the Supreme Court of the State. As this was a final adjudication that Stewart & Co. were not creditors of Sonneborn, they no longer had any standing in the bankruptcy proceedings; and, accordingly, those proceedings were dismissed.

Sonneborn now brought this action for malicious prosecution against Stewart & Co., alleging that they had maliciously and

without probable cause procured him to be adjudged a bankrupt and his goods to be seized. The defendants relied upon their *bona fide* belief that Sonneborn was indebted to them, and also upon the advice of counsel that he had committed an act of bankruptcy, insisting that these facts constituted probable cause and excluded the possibility of malice. The trial court ruled against this contention, holding that the claim of probable cause was concluded adversely to the defendants by the judgment, which established the fact that they were not creditors of Sonneborn. The jury were therefore directed to find a verdict for Sonneborn, and he was allowed damages to the amount of $21,000, for which he had judgment. But the judgment was reversed by the Supreme Court on the ground that the trial court had erred on both points of the defence.

STRONG, J.: The instruction given was (*inter alia*) as follows: "But if they (the defendants) had no legal claim or demand against the complainant (Sonneborn), then, whether they had probable cause or not, they had no right to institute the proceedings (in bankruptcy). They cannot go back and allege that, though they had no legal claim against him, they thought they had; in other words, that they had probable cause to believe that they had such a demand. Unless they had a debt, they cannot allege probable cause for proceeding in bankruptcy at all. Their defence cannot stand on two probable causes, one on top of the other. * * * As it has been adjudicated by the Circuit Court of Barbour County, and affirmed by the State Supreme Court, that the defendants never had a legal claim against the plaintiff, and therefore had no right to institute proceedings in bankruptcy against him, the plaintiff is entitled to recover in this action the damages he has sustained by those unlawful proceedings. The court therefore rules that the defence in this case cannot be sustained by proving that the defendants had probable cause to believe that the plaintiff had committed an act of bankruptcy; but it being shown by judicial determination that they had no legal claim or debt against the plaintiff, and had, therefore, no right to institute bankruptcy proceedings, they are liable for the damages sustained by the plaintiff thereby, and the only question for the jury will be the amount of the damages, under the circumstances of the case. * * * We charge you, therefore, that the plaintiff is entitled to recover his actual damage, or the loss he has actually sustained at all events." * * * And again: "The actual damages sustained by the complainant, that you will give him a verdict for at all events."

This construction, we think, was erroneous, and emphatically so in view of the facts which appeared in evidence. It ignores totally the question whether the conduct of the defendants had been attended by malice, though the plaintiff's declaration charged malice, and it denied all importance to the necessary inquiry, whether they had probable

cause for their action. More than this, it disregarded entirely evidence of facts which have been determined to be in law a perfect defence to an action for a malicious prosecution. The jury were positively instructed to return a verdict for the plaintiff independently of any consideration of malice in the institution of the bankruptcy proceedings, or want of probable cause therefor. If the charge was correct, then every man who brings a suit against another, with the most firm and reasonable belief that he has a just claim, and a lawful right to resort to the courts, is responsible in damages for the consequences of his action, if he happens to fail in his suit. His intentions may have been most honest, his purpose only to secure his own, in the only way in which the law permits it to be secured; he may have had no ill-feeling against his supposed debtor, and may have done nothing which the law forbids. Such is not the law. It is abundantly settled that no suit can be maintained against an unsuccessful plaintiff or prosecutor, unless it is shown affirmatively that he was actuated in his conduct by malice, or some improper or sinister motive. Malice is essential to the maintenance of any such action, and not merely (as the Circuit Court thought) to the recovery of exemplary damages. Notwithstanding what has been said in some decisions of a distinction between actions for criminal prosecutions and civil suits, both classes at the present day require substantially the same essentials. Certainly an action for instituting a civil suit requires not less for its maintenance than an action for a malicious prosecution of a criminal proceeding. Nicholson vs. Cohill, 4 Barn. & Cress. 21; Webb vs. Hill, 3 Carr. & P. 485; Burhams vs. Sanford, 19 Wend. (N. Y.) 417; Cotton vs. Huidekoper, 2 Pa. 149. * * *

There was also error in the charge in so far as it took away from the defendants the protection of probable cause for their instituting the proceedings in bankruptcy. The court ruled that the defence could not be sustained by proving they had probable cause for believing the plaintiff had committed an act of bankrutpcy, because, after the proceedings had been commenced, it was established by a verdict and a judgment thereon that the plaintiff was not indebted to them, and consequently that they had no right to institute bankruptcy proceedings against him. It was further charged that "if they had no legal claim or demand against the plaintiff, then whether they had probable cause or not, they had no right to institute the proceedings. They cannot go back and allege that, though they had not a legal claim or debt against him, they thought they had, or that they had probable cause to believe they had such a demand. Unless they had a debt they cannot allege probable cause for proceeding in bankruptcy at all." To this we cannot assent. The existence of a want of probable cause is, as we have seen, essential to every suit for a malicious prosecution. Both that and malice must concur. Malice, it is admitted, may be inferred by the jury from want of probable cause, but the want of that cannot be inferred from any degree of even express malice. Sutton vs. Johnstone, 1 T. R. 493; Murray vs. Long, 1 Wend. (N. Y.) 140; Wood vs. Weir & Sayre, 5 B. Mon. (Ky.) 544. It is true that what amounts to probable

cause is a question of law in a very important sense. In the celebrated case of Sutton vs. Johnstone, the rule was thus laid down: "The question of probable cause is a mixed question of law and of fact. Whether the circumstances alleged to show it probable are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to a probable cause, is a question of law." This is the doctrine generally adopted. McCormick vs. Sisson, 7 Cow. (N. Y.) 715; Besson vs. Southard, 10 N. Y. 236. * * *

The Circuit Court thought in the present case, and so charged, that the fact that, after the institution of the bankruptcy proceedings, a judgment was given in the Barbour Circuit Court against the defendants, thus determining that the plaintiff was not indebted to them, precluded them from setting up that they had probable cause for their action. That was giving undue effect to the judgment. The conduct of the defendants is to be weighed in view of what appeared to them when they filed their petition in the bankrupt court,—not in the light of subsequently appearing facts. Had they reasonable cause for their action when they took it? Not what the actual fact was, but what they had reason to believe it was. Faris vs. Starke, 3 B. Mon. (Ky.) 4, 6; Raulston vs. Jackson, 1 Sneed (Tenn.), 128.

In every case of an action for a malicious prosecution or suit, it must be averred and proved that the proceeding instituted against the plaintiff has failed, but its failure has never been held to be evidence of either malice or want of probable cause for its institution; much less that it is conclusive of those things. Cloon vs. Gerry, 13 Gray (Mass.), 201; 1 Hilliard, Torts, and cases there collected. The final judgment in the Circuit Court of Barbour County did not, therefore, justify the court in charging either that there was no probable cause for the bankruptcy proceedings, or that the presence or absence of such cause was immaterial. If when they filed their petition to have the plaintiff declared a bankrupt, the defendants believed, and had reasonable cause to believe, that the plaintiff was indebted to them for the goods sold to E. Leipzeiger & Co., in 1867, and had reasonable cause to believe that he had committed an act of bankruptcy, there was probable cause for their action, and the plaintiff was not entitled to recover. That they had reasonable cause to believe an act of bankruptcy had been committed must be conceded in view of the manner in which the judgment of Jonas Sonneborn against him had been obtained on the 12th of June, 1873, and in view of the decision of this court in Buchanan vs. Smith, 16 Wall. 277. If, therefore, they had an honest and reasonable conviction that the plaintiff was their debtor, that he was liable to them for the bills of goods sold by them in 1867 to E. Leipzeiger & Co., they had probable cause for instituting the proceedings in bankruptcy, and their defence was complete. The jury should have been so instructed.

We think, also, there was error in refusing to charge the jury as requested in the defendants' first point, which was as follows: "If the jury believe, from all the evidence, that A. T. Stewart & Co. acted on the advice of counsel in prosecuting their claim against Sonneborn in the Circuit Court of Barbour County, and upon such advice had an

honest belief in the validity of their debt, and their right to recover in said action; and in the institution of the bankruptcy proceedings acted likewise on the advice of counsel, and under an honest belief that they were taking and using only such remedies as the law provided for the collection of what they believed to be a *bona fide* debt, they having first given a full statement of the facts of the case to counsel,—then there was not such malice in the wrongful use of legal process by them as will entitle the plaintiff to recover in this form of action." This the court refused to affirm, "except as contained and qualified in the preceding charge." An examination of the charge, however, reveals that the instruction was not contained in it, nor alluded to. The defendants, we think, had a right to have it affirmed as presented. There was enough in the evidence to justify its presentation. It was proved that, before they commenced their suit in the Circuit Court of Barbour County, the defendants were advised by an eminent lawyer of Alabama, of twenty-five years' standing in the profession, respecting their legal right to recover the debt from the plaintiff, that, in his opinion, the plaintiff was liable therefor. It was further testified that the same lawyer advised them that, in his opinion, the plaintiff had rendered himself liable to involuntary bankruptcy proceedings by suffering his brother's judgment to go against him by default, and by advertising his entire stock of goods at and below New York cost. It was not until after this advice had been given that the petition in bankruptcy was prepared and filed.

That the facts stated in the point proposed, if believed by the jury, were a perfect defence to the action; that they constituted in law a probable cause, and being such, that malice alone, if there was such, was insufficient to entitle the plaintiff to recover,—is, in view of the decisions, beyond doubt. Snow vs. Allen, 1 Stark. 502; Ravenga vs. Mackintosh, 2 Barn. & Cress. 693; Walter vs. Sample, 25 Pa. St. 275; Cooper vs. Utterbach, 37 Md. 282; Olmstead vs. Partridge, 16 Gray (Mass.), 381. These cases, and many others that might be cited, show that if the defendants in such a case as this acted *bona fide* upon legal advice, their defence is perfect.

Pullen vs. Glidden, 66 Maine, 202 (1877).

This was an action for malicious prosecution. It appeared that the defendant had made before a magistrate a complaint charging the plaintiff with forgery, on which the plaintiff had been arrested, tried and acquitted. The judge presiding at the trial of this action held that there had not been probable cause for the charge against the plaintiff. On the question of malice he said to the jury:

"In regard to the other branch of the case necessary to be established by the plaintiff, it is that there was malice, that the prosecution was malicious. Now, what is malice? There are several kinds of malice; but the two kinds of malice that may perhaps be considered in this charge are malice in law and malice in fact. Now, what is malice in law? Malice in law is such malice as is inferred from the commission

of an act wrongful in itself, without justification or excuse. This is not the kind of malice required in this case. The malice required to be proved in this case is malice in fact. Malice in fact is where the wrongful act was committed with a bad intent, from motives of ill-will, resentment, hatred, a desire to injure, or the like. Did such kind of malice exist in the mind of the defendant when he commenced the prosecution in question? Did he do it from bad intent, from evil motives, or did he not? Malice may be inferred from the want of probable cause, or it may be inferred and proved by other evidence in the case. * * * If you should find that there was no malice, such as I have described, the plaintiff could not maintain this action."

The jury found a verdict for the defendant. *Held*, that the instruction was erroneous, in that it suggested to the jury that express malice or actual ill-will was necessary to a recovery by the plaintiff.

LIBBEY, J.: The plaintiff complains that this instruction required the jury to find malice in its more restricted popular sense, when proof of malice in its enlarged legal sense was all that the law requires. To maintain his case, it was necessary for the plaintiff to prove malice in fact, as distinguished from malice in law. Malice in law is where malice is established by legal presumption from proof of certain facts, as in actions for libel, where the law presumes malice from proof of the publication of the libellous matter. Malice in fact is to be found by the jury from the evidence in the case. They may infer it from want of probable cause. But it is well established that the plaintiff is not required to prove "express malice," in the popular signification of the term, as that the defendant was prompted by malevolence, or acted from motives of ill-will, resentment or hatred toward the plaintiff. It is sufficient if he prove it in its enlarged legal sense. "In a legal sense, any act done willfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious"; Com. vs. Snelling, 15 Pick. 337. "The malice necessary to be shown, in order to maintain this action, is not necessarily revenge, or other base and malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is, in legal contemplation, malicious"; Wills vs. Noyes, 12 Pick. 324. See also Page vs. Cushing, 38 Me. 523; Humphries vs. Parker, 52 Me. 502; Mitchell vs. Wall, 111 Mass. 492. We think, from a fair construction of the instruction upon this point, the jury must have understood that, in order to find for the plaintiff, they must find that the defendant, in prosecuting the plaintiff, was actuated by "express malice" in the popular sense of the term. In this respect it was erroneous.*

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*The malice requisite to be proved, in order to sustain an action for malicious prosecution, has been defined to be: "Any wrong or indirect motive: some other motive than a desire to bring to justice a person whom the prosecutor honestly believes to be guilty": Brown vs. Hawkes, 2 Q. B. 718; and again as, "Any evil or unlawful purpose as distinguished from that of promoting justice"; Ins. Co. vs. Miller (Ky.), 71 S. W. 921. While the jury may infer malice from the mere want of probable cause, it is not a rule of law that it must be so inferred; McCafferty vs. Philp, 151 Pa. St. 86; Small vs. McGovern, 117 Wisc. 608; Stubbs vs. Milholland, 168 Mo. 47; Stewart vs. Sonneborn, 98 U. S. 187.

Damages.

Pangborn vs. Bull, 1 Wendell, 345. New York (1828).

Pangburn had boarded with Bull for a few days in a period of two weeks at an agreed rate of 3 shillings a day. In the settlement Pangburn claimed that he owed for only three days, but Bull insisted that he was entitled to pay for four days, whereupon Pangburn paid him 12 shillings ($1.50) and took a receipt for that sum. Afterwards Pangburn brought a suit for $10 against Bull before a justice of the peace who held court at Guilderland, fourteen miles from Albany where Bull resided. Pangburn had been advised that he could not recover the alleged overpayment on his board bill, which was the only transaction that he had ever had with Bull; to which he answered that he would, at any rate, bring Bull four times out to Guilderland. The suit was called before the justice on April 8th; Bull appeared with witnesses; Pangburn had no witnesses and obtained an adjournment to the 18th, on which day he discontinued the action. On the same day Pangburn sued out another summons against Bull, returnable at Guilderland on the 28th. On that day a trial was had; Pangburn offered no evidence except a declaration made by Bull that he had been paid $1.50 by Pangburn for board; and the justice rendered judgment in favor of Bull for the costs of the suit.

Bull now sued Pangburn in the court of Common Pleas for malicious prosecution. Upon proof of the facts just stated, the court directed the jury to find for the plaintiff if they should find that the defendant's suits before the justice had been brought maliciously and without probable cause. The verdict was for Bull in the sum of $7.25. The Supreme Court held that the action was maintainable. Although that court observed that the trial judge had erred in not telling the jury whether or not the facts established amounted to probable cause for Pangburn's suit, the error was declared harmless, it being considered clear, as matter of law, that Pangburn's payment of the disputed bill, with full knowledge of the facts, was conclusive of the original controversy; wherefore Pangburn could have had no probable cause for an action on that account.

WOODWORTH, J.: From an examination of the cases it appears that an arrest and holding to bail are not indispensably necessary in order to maintain an action for malicious prosecution. It has been sustained in cases where there was neither an arrest nor bail; and, when it is considered that malice and the want of probable cause are the foundation of the action, it would seem, on principle, to reach cases where the injury would be equally great, although the proceeding did not require an arrest or bail. * * * In the case of Reynolds vs. Kennedy, 1 Wilson. 232 [King's Bench, 1748], . . . it is observed by the court . . . the express malice and the grievance must be laid in the declaration and proved; and it is not enough to say that the defendant brought an action against the plaintiff *ex malitia* and *sine causa, per quod* he put the plaintiff to great charges. I understand from this doctrine that something more than a general allegation that the suit was commenced maliciously must be stated; a particular grievance must be alleged. I incline to think the plaintiff has complied with this rule by setting out the several suits, adjournments and proceedings which constituted the grievance complained of and from which resulted the damage sustained. The court further observe that, if an action upon a false surmise be brought in a proper court, an action does not lie against him who brought it, and thereby charge him with it as a fault directly, for *executio juris non habet injuriam;* but the gist of this sort of actions arises from some evil practice or malice in him who sues or prosecutes. * * *

The case of Waterer vs. Freeman, Hobart, 206 (1620), recognizes the doctrine that, although an action be brought in a proper court, if the suit or proceeding be utterly without ground, and that known to the person himself, an action lies for the undue vexation and damage to the plaintiff. CHIEF JUDGE HOBART, in delivering the opinion of the court, went into a full exposition of the principles upon which the right of recovery was founded; and although the injury was against the property, the action was held to lie.

The question remaining to be considered is whether there was sufficient evidence of malice and the want of probable cause. The plaintiff was bound to show both. The rule seems to be that, from the want of probable cause, malice may be, and commonly is, implied; but from the most express malice, the want of a probable cause cannot be implied. The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probable or not probable are true and existed, is a matter of fact; but whether, supposing them true, they amounted to a probable cause, is a question of law. * * *

The jury found damages for the plaintiff. Probably they had no difficulty in arriving at the conclusion that the defendant's motives were malicious after proof of the defendant's declaration that he would bring the plaintiff four times to Guilderland for the same cause, and the course he pursued to effect the object in view. But they also passed on the question of want of probable cause; and, although the court ought to have instructed the jury whether, on the supposition that certain facts were established, they would show the want of probable

cause, still, if, on review of the case by this court, it shall appear from the facts not disputed at the trial that there was evidently a want of probable cause, the verdict ought not to be set aside for the error of the court below in this respect. * * *

It then appears that there was no probable cause on the fact or the law, but the want of it. A case so palpably unfounded, and known to be so, warrants the inference that the prosecution was intentionally vexatious. This, coupled with the avowed purpose of the defendant to call the plaintiff to Guilderland four times, a distance of fourteen miles, shows very satisfactorily that there was express malice.

The Supreme Lodge of the American Protective League vs. Unverzagt, 76 Md. 104 (1892).

Unverzagt and some others filed a bill in equity against the Protective League, a corporation, making divers damaging allegations against the League, and praying that it might be dissolved by a decree of the court. The complainants took no testimony in support of this suit, and the bill was therefore dismissed. Afterwards this action was brought by the corporation against Unverzagt and his co-complainants to recover damages for the institution of the equity suit, the declaration averring that that sent had been brought maliciously and without probable cause, and only for the purpose of injuring the corporation, that the charges made in the bill were false, malicious and slanderous, and that those charges had been widely circulated for the sake of destroying the confidence of the public in the League. A demurrer to this declaration raised the question whether an action for malicious prosecution would lie in Maryland on account of such an antecedent suit as was shown to have been brought against the now plaintiff.

Held, that the declaration did not set forth a good and sufficient cause of action; the allegations were too general; the plaintiff, being a corporation, had no personal character to be injured by the alleged slanderous allegations; it was not made to appear in what manner such allegations affected its property; and there was no allegation that the property of the plaintiff was seized or in any manner interfered with.

FOWLER, J.: The only question, therefore, presented by this record is the sufficiency of the declaration, and this involves a question about which there has been much conflict of authority in this country, namely,

when and under what circumstances an action on the case lies for falsely, maliciously and without probable cause bringing a civil suit.

At common law, an action on the case was given for all civil cases brought falsely, maliciously and without probable cause.

Nor was the right to such action at all dependent upon an interference with either the person or property. But, after the passage of the Statute of Marlbridge in the fifty-second year of Henry the Third [A. D. 1268], which gave costs to the defendant by way of damage against the plaintiff *pro falso clamore*, it was held that the malicious prosecution of a civil suit without probable cause, was not good ground for an action on the case, unless there was an arrest of the person, or a seizure of property, or other special injury, which would not necessarily result in all suits prosecuted to recover for like causes of action. Co. Lit. 161a.

In this country some of the States have adopted the common law doctrine as it existed in England before the passage of the Statute of Marlbridge, and others adhere to the modern rule which has prevailed there since the passage of that statute.

In the case of McNamee vs. Minke, 49 Md. 122, which was an action on the case for malicious prosecution of an ejectment suit, we have fully adopted the latter doctrine, and the language there used—the present CHIEF JUDGE delivering the opinion of the court—disposes of this case: "It is true, a party may be held liable for a false and malicious prosecution of either a criminal or civil proceeding; but, when it has been attempted to hold a party liable for the prosecution of a civil proceeding, it has generally been in cases where there has been an alleged malicious arrest of the person, as in the case of Turner vs. Walker, 3 Gill & John. 377, or a groundless and malicious seizure of property, or a false and malicious placing of the plaintiff in bankruptcy, or the like." * * *

It may be said, that in general an action like this does not lie unless there is a concurrence of:

First—Falsehood in the demand;

Second—Want of probable cause;

Third—Malice in the defendant;

Fourth—Damage by arrest or imprisonment, seizure of property, bankruptcy proceedings, or the like.

Malicious Abuse of Process.

Grainger vs. Hill, 4 Bingham's New Cases 212. Common Pleas (1838).

In September of 1836, Grainger, being the owner and master of a small sailing vessel, borrowed of Hill and another £80, and gave a mortgage upon his vessel to secure the loan. The debt was not due until September 28, 1837; but in November of 1836 the lenders conceived that their security was insufficient, and resolved to get possession of the ship's register, a

document without which the vessel could not go to sea. Hill and his associate, accordingly, threatened to arrest Grainger unless the money were repaid at once; and shortly thereafter, they instituted a suit against him for nearly £96. In this action they took a writ of *capias,* by which an officer of the court was authorized to arrest Grainger and lodge him in prison to await the trial of the suit unless he should give bail in an amount sufficient to secure payment of the sum sued for. With this writ two sheriff's officers went to the lodgings of Grainger, who was confined to his bed by illness and in a condition which made it dangerous for him to be removed. The officers stated that they had not come to take him, but to get the ship's register, and that he must either surrender that document, or find bail, or remain in the custody of an officer. Grainger was unable to find bail, and, being much alarmed, gave up the register. Afterwards he repaid the money borrowed, paid the costs of the action, and obtained a release of the mortgage. Nothing further was done in the suit brought by Hill and his associate, which was not entered as dismissed or otherwise terminated.

Grainger then brought this action, alleging that the defendants had brought their former suit, "wrongfully, illegally and maliciously contriving to injure, harass and distress the plaintiff, and to compel the plaintiff, by and through fear and duress of imprisonment, to give up and relinguish" the ship's register, and that they had caused him to be arrested, and had obliged him to surrender the register, in the manner which has been stated. The declaration alleged also that the now plaintiff had, by reason of the facts shown, lost the profits of four voyages from London to Caen; but it was not alleged that the former action was ended, nor that it had been instituted without reasonable and probable cause.

There was also a count in trover, charging a conversion of the ship's register, in which count there was no averment that the plaintiff had demanded, and the defendants refused, a redelivery of the document.

Held, that Grainger was entitled to recover damages for the abuse of the warrant of arrest, although the original action had

not terminated; and also that he was entitled to recover on the count in trover as for a conversion of the register.

TINDAL, C. J.: The first ground urged for a non-suit is that the facts proved with respect to the writ of capias do not amount to an arrest. It appears to me that the arrest was sufficiently established. The facts are, that the sheriff's officer comes with a capias to the plaintiff, when he is ill in bed, and tells him that, unless he delivers the register or finds bail, he must either take him or leave a man with him. Without actual contact, the officer's insisting that the plaintiff should produce the register or find bail shows that the plaintiff was in a situation in which bail was to be procured; that was a sufficient restraint upon the plaintiff's person to amount to an arrest. The authority in Buller's Nisi Prius, p. 62, goes the full length: "If the bailiff who has a process against one says to him, when he is on horseback or in a coach, 'You are my prisoner; I have a writ against you'; upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet is an arrest, because he submitted to the process."

The second ground urged for a non-suit is that there was no proof of the suit commenced by the defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the defendants' proceeding, is the same: that this is an action for abusing the process of the law, by applying it to extort property from the plaintiff, and not an action for a malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. * * * If the course pursued by the defendants is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of the law has been abused to effect an object not within the scope of process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause.

As to the count in trover, if the taking of the register was wrongful, that taking was of itself a conversion, and no demand or refusal was necessary as a preliminary to this action; and it seems to me that taking the property of another without his consent, by an abuse of the process of the law, must be deemed a wrongful taking.

PARK, J.: As to the count in trover, the compulsion under which the register was obtained was tantamount to a conversion, and a demand and refusal was not necessary in order to support this action. In Parker vs. Patrick, 5 T. R. 175, where the defendant had regained possession of goods of which he had been deprived by a fraud, and the plaintiff, who had given value for them without notice of the fraud, sued him in trover and obtained a verdict, it was never objected that he should have demanded the goods in order to commence his action. So in Wyatt vs. Blades, 3 Campbell, 396, the act of bankruptcy was

committed on the 8th of December; the goods were seized on the 8th of February following, and carried to a broker's; on the 12th of the same month the commission issued; and notice was afterwards served upon the sheriff not to sell the goods, as they belonged to the assignees; in consequence the goods were never sold, but still remained at the broker's, and no demand of them was ever made; but LORD ELLENBOROUGH said: "Had the goods not been removed, it would have been difficult to say there was any conversion; but I think the removal of them after the act of bankruptcy is a sufficient conversion to maintain the action, notwithstanding the subsequent notice." That is a strong case to show that, where the circumstances attending the taking are tantamount to an actual conversion, a demand is not necessary to support an action of trover.

BOSANQUET, J.: It was not necessary to prove, and I think, under the circumstances of this case, it was not necessary either to allege or prove the termination of the defendants' suit. This is not an action for malicious arrest or prosecution, or for maliciously doing that which the law allows to be done; the process was enforced for an ulterior purpose, to obtain property by duress to which the defendants had no right. The action is not for maliciously putting process in force, but for maliciously abusing the process of the court.

Zinn vs. Rice, 154 Mass. 1 (1891).

Rice brought an action against Zinn for an indebtedness due from the latter, and sued out a writ of attachment under which the goods of Zinn were seized. Whilst Rice's action was still pending, Zinn brought the present suit, alleging that Rice's attachment was for an amount in excess of what was necessary to secure the amount due. Rice objected that this action was prematurely brought, and that Zinn was bound to await the termination of the principal suit before suing on account of the wrongful attachment, as in cases of malicious prosecution. But the court distinguished such a case as the present from one of malicious prosecution, and held the action maintainable without regard to the state of the former suit.

W. ALLEN, J.: The defendant's contention is that the action is prematurely brought; that it is an action for malicious prosecution, and subject to the rule that a suit for malicious prosecution cannot be maintained until the prosecution has terminated in favor of the plaintiff. But the rule applies only to suits for maliciously instituting groundless prosecutions, and does not apply to the injurious and malicious use of process in proceedings which were commenced with probable cause. The latter, being for the malicious use of legal process by acts authorized by its terms, may be called "actions for malicious prosecution," to distinguish them from actions for the abuse of process by doing under color of legal process acts not authorized by it; but there is no rule of law that in such an action the termination of any former suit must be shown. The rule is founded upon the necessity of proving that a prose-

cution, which itself puts in issue the truth of the charge on which it is founded, is without probable cause. A defendant in such an action cannot bring another action to try the issue tendered by him in the first while that issue is pending. The rule is, by its terms and nature, limited to a prosecution to establish a charge or cause of action, and cannot include an *ex parte* use of process incidental and collateral to such a prosecution, and in defence to which falsity of the charge cannot be shown [citing cases].

In the case at bar, the grievance of the plaintiff is not that the defendant maliciously commenced a groundless suit. He admits that the plaintiff had a good cause of action, and that there is no defence to the suit, and that its termination cannot be in his favor. Nor is his grievance that the defendant abused the process in the former suit, and, under color of it, did things not authorized by its terms. His grievance is, that the defendant, having a just cause of action, and a legal suit against this plaintiff, made an excessive attachment of property, which he knew was not needed for the security of his debt, not for the purpose of securing his debt, but for the purpose of injuring the plaintiff. If the plaintiff has any right of action, which is not controverted, it is idle to say that he must wait until the former action has terminated in his favor.

DEFAMATION.

Defamation may be addressed either to the hearing, when it is slander, or to the sight, when it is libel. Slander, therefore, is effected by speech alone; libel by writing, printing, or other visible means of imputation, as by placing a gallows or a red light before the house of one intended to be defamed, riding Skimmington, and the use of other derogatory symbols.

Any kind of defamation is actionable if it be false and result in special damage to the person defamed. But a falsehood, though it is intended to be damaging and so result, is not actionable if it be not defamatory in its nature; as where it imputes to one an innocent or meritorious action which happens to be considered uncommendable and prejudicial by the person who is told of it:

Kelly vs. Partington, 5 B. & Ad. 645.
Knight vs. Blackford, 3 Mackey, 177.

Although it is essential to actionable defamation that it be malicious, the malice requisite is not necessarily actual animosity or a desire to cause injury, but the intent to do an act which is in fact wrongful, though possibly not known or intended to be wrongful. The necessary malice is inferred from the falsity of the statement, and may exist even where the speaker or writer believes what he says to be true:

Bromage vs. Prosser, *infra,* p. 204.

A. SLANDER.

1. Words Actionable Per Se.

Words merely spoken are actionable *per se,* that is. warrant recovery without proof of actual damage resulting, only in cases falling within these categories:

I. Words falsely imputing the commission of certain crimes;

II. Words falsely imputing certain diseases of a discreditable or otherwise prejudicial nature; and

III. Words falsely imputing to the subject thereof any unfitness for an office or employment which he holds or for the vocation which he follows, or any want of capacity, skill or integrity in the exercise of such office or vocation.

This classification combines, for convenience to the memory, the third and fourth of the classes defined in

Pollard vs. Lyon, *infra,* p. 170.

I. What crimes must be imputed in order to render a slander actionable *per se,* is a subject upon which the courts of various jurisdictions have laid down various rules.

1. In England, and in some American States, including Maryland, the offence charged must be one which is primarily punishable by imprisonment, and not one for which the penalty is only a fine, though the non-payment of such fine may result in imprisonment:

Webb vs. Beavan, *infra,* p. 175;
Hellwig vs. Mitchell, *infra,* p. 173;
Shafer vs. Ahalt, *infra,* p. 176.

2. In the Federal courts and in some States, including New York, the offence charged must be one involving moral turpitude or rendering the offender liable to some infamous punishment:

Pollard vs. Lyon, *infra,* p. 170;
Brooker vs. Coffin, *infra,* p. 168.

3. In other States, as in Massachusetts and Pennsylvania, the offence must be one which may subject the offender to a punishment which, though not infamous, will bring disgrace upon him:

Brown vs. Nickerson, *infra,* p. 176;
Miller vs. Parish, 8 Pick. 385;
Davis vs. Carey, *infra,* p. 177.

Respecting these definitions some difficulties arise from such considerations as these:

(*a*) The rule in England and in Maryland would, in some jurisdictions at least, make actionable the imputation of many misdemeanors

which are of comparatively slight gravity. By the common law most, if not all, misdemeanors may be punished by imprisonment, in the discretion of the court, and many were punishable otherwise corporally, as by whipping, the pillory, the stocks, or the ducking-stool. And in modern practice, in certain jurisdictions at any rate, assault and battery and like minor misdemeanors may be, if the court sees proper, punished primarily by imprisonment, without the alternative of a fine. Yet it is not supposed that in England or in Maryland a slanderous charge of assault and battery or of intoxication is actionable *per se*.

(*b*) Some of the cases seem to suggest a distinction between indictable offenses and those which are not indictable, the latter class being misdemeanors of minor gravity, such as prostitution, vagrancy, juggling and the like, mentioned in Brooker vs. Coffin. But, at common law, any crime may be made the subject of an indictment; and in some, at least, of the American jurisdictions, even such misdemeanors as assault and battery and failure to support a wife are, in particular cases, actually so prosecuted. It would, therefore, be difficult to classify offences with reference to the possibility of indictment.

(*c*) What is moral turpitude, within the meaning of the New York rule, is not, in view of diverse modern opinions on the point, easily definable. In Brooker vs. Coffin, prostitution was held not to involve moral turpitude; but seven years later it was held that procuring an abortion and keeping a bawdy-house were offences evincing turpitude; 13 Johns. 124; *ibid.* 275. Pollard vs. Lyon seems to assume that turpitude is not involved in fornication; other cases hold to the contrary in respect of adultery. The judicial conception of moral turpitude seems to vary quite materially with the changing ethical sentiments of the community. A recent Minnesota case (Pett-Morgan vs. Kennedy, *infra*) pronounces gross intoxication a manifestation of moral turpitude; and, very likely, there are jurisdictions in which the courts would make the same ruling with reference to the sale of alcoholic liquor, even though such sale were authorized by law. Such a ruling as that in Pett-Morgan vs. Kennedy would undoubtedly have shocked the judges who decided Brooker vs. Coffin as betraying a profound insensibility to moral distinctions.

(*d*) "There is great difficulty," says MR. JUSTICE MILLER in his work on the Constitution, "in deciding what was meant a hundred years ago by the phrase *infamous crime*." Mr. Eden, in his work on the Principles of Penal Law, published about 1770, observed: "There are two kinds of infamy; the one founded in the opinions of the people respecting the mode of punishment; the other in the construction of law respecting the future credibility of the delinquent." The same ambiguity in the word is recognized in Davis vs. Carey, *infra*, which holds, however, that the infamous charge which is actionable *per se* is not merely one which renders the offender incompetent as a witness—treason, felony and the *crimen falsi*—but one which is infamous in popular estimation because of its disgraceful character or disgraceful punishment. In Brooker vs. Coffin prostitution was considered not infamous in this popular sense, and imprisonment in a house of correction was

held not an infamous punishment. What, at the date of that decision, was deemed an infamous punishment, would be hard now to ascertain, judicial opinions on the subject being widely at variance; and, as observed in *Ex parte Wilson*, 114 U. S. 417 [1884], "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another. In former times, being put in the stocks was not considered as necessarily infamous. And by the first Judiciary Act of the United States, whipping was classed with moderate fines and short terms of imprisonment. * * * But at the present day either stocks or whipping might be thought an infamous punishment." The case last cited defines an infamous crime, as that expression is used in the Federal Constitution, to be one that is punishable by imprisonment in a penitentiary. To say, then, that the crime of which an imputation is actionable *per se* must be an infamous crime, may mean either that it is one rendering the offender incompetent as a witness, or that it is one punishable by imprisonment in the penitentiary, or that it is one which is, in popular opinion, disgraceful because of its nature, or that it is one popularly regarded as disgraceful because disgracefully punished—and what crimes are in their nature sufficiently disgraceful, and what modes of punishment are sufficiently disgraceful, to supply the ingredients of infamy, are matters which vary in various periods, and at the same date in different communities. The rule laid down in Brooker vs. Coffin, and followed in Pollard vs. Lyon, does not, therefore, make quite certain the limit of actionable slander in respect of criminous imputations.

(*e*) The Massachusetts rule, referring the actionable character of this kind of slander simply to the disgraceful effect of the charge, without regard to the severity or disgrace of the punishment, leaves the subject even more at large. In Brown vs. Nickerson, *infra*, the tortious nature of the words seems to have been determined by the sex of the plaintiff, the opinion pretty clearly implying that it is not disgraceful for a man to be drunk, or, at any rate, not so disgraceful that a man could recover for a false imputation of drunkenness. The unsatisfactory character of the general rule is due to the uncertainty concerning what is disgraceful, there being no consensus of public opinion on that subject. Some persons would regard the use of profanity as disgraceful to a woman, others as disgraceful to one of either sex; in respect of other words and actions, different persons would fix at various degrees of grossness, immodesty, dissoluteness, depravity, or criminality, the point at which disgrace attaches; while, in certain considerable, and not altogether uninfluential, circles of society, proficiency in some forms of vice and crime are esteemed creditable. To make an imputation of crime actionable with reference altogether to the disgracefulness of the offence charged, and no reference at all to its intrinsic immorality or to the gravity of its punishment, seems like putting a very considerable extent of the subject in the discretion of the court—leaving it to the judge's individual opinion as to what is unbecoming conduct.

An imputation of crime is none the less actionable because it suggests also that the subject of the charge is no longer liable to punishment for it:

Fowler vs. Dowdney, *infra*, p. 179.

II. Words imputing disease are actionable *per se* only when they import that the person slandered is presently suffering from leprosy, the plague or some venereal malady. The reason usually assigned for fixing upon these particular disorders, namely, that they exclude the patient from society is hardly consistent either with the exception of other diseases or with fact. The itch and small-pox certainly tend as much to exclude from society those who suffer from them as do the venereal disorders, and it cannot be affirmed that these last named infirmities are generally regarded as socially disqualifying. The reason for the selection of the plague and leprosy is historical, the ancient law having provided for the removal of persons afflicted with those diseases to places remote from other human habitation, where the sufferer was left to die in isolation; while with respect to other contagious and infectious diseases there is no such drastic and irrevocable segregation. The imputation of venereal disease is actionable because of the discredit attaching to them—"the odiousness of the infection," as one case says, and perhaps also, despite the authority of the same case, to "the wicked means of getting them":

Crittal vs. Horner, and note thereto, *infra*, p. 179.

A charge of such disease as a condition in the past but not in the present is not actionable *per se*:

Carslake vs. Mapledoram, *infra*, p. 180.

III. Words prejudicing the subject thereof in his office, employment or occupation are actionable *per se* only when they import some unfitness for such position or vocation or some delinquency in acting therein.

It is not sufficient to make such words actionable *per se* that they tend to discredit the person slandered on grounds other than his capacity or conduct in his office or occupation, although

those grounds may be such as indirectly to affect his employment or success in his vocation. To charge a physician with a dissolute disposition may cause many persons to avoid employing him, and so impair his practice; but such a charge, though false, is not actionable *per se* unless it imputes some misconduct in the exercise of his profession:

Ayre vs. Craven, *infra,* p. 180;
Lumby vs. Allday, *infra,* p. 181;
Blumhardt vs. Rohr, 70 Md. 328;
Dicken vs. Shepherd, 22 Md. 339.

2. Words Not Actionable Per Se.

Where spoken words do not fall within any of the categories above defined, they are not actionable without proof of special damage. Thus, it is not actionable *per se* to say of a man that he is a rogue, a scoundrel, a libertine, or a drunkard—unless drunkenness be a crime—or otherwise to impute to him any moral delinquency or discreditable conduct not included in any of the three classes of defamatory charges which are slanderous *per se;* as by calling him a crook:

Friedlander vs. Rapley, *infra,* p. 182;

or a disgrace to the town:

Lumby vs. Allday, *infra,* p. 181.

Special Damage, such as is requisite to warrant recovery for words not in themselves actionable, is actual loss, demonstrable as resulting from the words, and of a material nature, that is, measurable in money. Of this character are the loss by a woman, and perhaps by a man, of a marriage shown to have been possible but to have been defeated by the slander. So is the loss of employment, naturally and reasonably resulting from a defamatory statement; but not a discharge from employment or a refusal of employment which is due to the employer's wrongful act or unreasonable attitude occasioned by the slander:

Kelly vs. Partington, 5 B. & Ad. 645;
Vicars vs. Wilcocks, 8 East. 1; 2 Smith L. C. 553;

the latter of which cases, however, has been criticised and limited:

Lynch vs. Knight, 9 H. L. Cases, 577; note to Vicars vs. Wilcocks, 2 Sm. L. C. 553.

So special damage may be the refusal or withdrawal of hospitable entertainment, where such entertainment includes something of pecuniary value, as food and lodging:

Moore vs. Meagher, and cases cited in note thereto, *infra,* p. 182.

On the other hand, where the injury is only mental annoyance or distress, though it may conduce to bodily illness, or an impairment of the reputation, without any specific substantial loss, it is not such special damage as will entitle the sufferer to recover:

Roberts vs. Roberts, *supra,* p. 51;
Allsop vs. Allsop, *infra,* p. 185;
Terwilliger vs. Wands, *infra,* p. 184;
Pollard vs. Lyon, *infra,* p. 170;
Shafer vs. Ahalt, *infra,* p. 176.

B. LIBEL.

Libel is anything written or printed which is calculated to expose the subject thereof to hatred, contempt, censure or ridicule.

Such defamation is actionable without proof of any actual damage resulting therefrom. Libel, therefore, includes many forms of injurious imputation, which, being written or printed, are torts, though they would not be actionable if only spoken: "Scandalous matter is not necessary to make a libel":

Cropp vs. Tilney, *infra,* p. 185;
Villers vs. Monsley, *infra,* p. 187;
Levi vs. Milne, *infra,* p. 188;
Snyder vs. Fulton, 34 Md. 128.

What language is libellous depends, therefore, largely upon public opinion as to what is odious, censurable or ridiculous; and such opinion is not always the same at all times or all

places. Even in the same community and at the same time, different classes may hold different opinions on the subject; and the libellous character of a publication may be determinable by such considerations as are suggested in

Peck vs. Tribune Co., *infra,* p. 186.

C. DEFENCES IN CASES OF DEFAMATION.

Where one has published a slander or a libel, and the publication can be proved, he may escape liability for the apparent tort upon the ground either of Justification or of Privilege.

I. **Justification** is proof that the defamatory charge is true. The truth of the words is a sufficient defence in all civil actions for defamation, though not always in criminal prosecutions for libel.

In order to justify, the defendant must prove that the words are in fact true, and not that he in good faith believed them to be true, or that he had good reason for believing them to be true, or that the plaintiff was actually guilty of some misconduct closely resembling or approximating in nature that charged by the defendant:

Shepard vs. Merrill, *infra,* p. 190.

A defendant sued for charging that the plaintiff stole a horse cannot justify by proving that the plaintiff stole a hog: Dillard vs. Collins, 25 Grattan, 343. A charge of rape is not justified by proving an attempt to commit rape: Pallet vs. Sergeant, 36 N. H. 496; a charge of unchaste conduct with one person is not justified by proof of like misconduct committed with another person: Hallowell vs. Guntle, 82 Ind. 554.

Nor can the defendant justify by showing that he had good reason for believing his charge to be true, as by proving credible information to that effect or reports and rumors current in the community:

Thompson vs. Nye, 16 Q. B. 181.
Bodwell vs. Swan, 3 Pick. 376.
Dame vs. Kenney, 25 N. H. 318.
Cases cited at 2 Sm. L. C. (8th ed.) 998.

"A person publishes libellous matter at his peril"; per HOLMES, J., in Burt vs. Advertiser Co., 154 Mass. 238.

Such information, reports and other facts going to show the defendant's honest and reasonable belief in the truth of what he has charged were held, in most of the older cases, to be altogether unavailable as a defence. The tendency of the modern cases, however, is to the position that rumors affecting the plaintiff's reputation, and information had by the defendant warranting a belief that his words were true, may be shown for the purpose of reducing the damages, first, by proving that the plaintiff's reputation was already impaired, and, second, by disproving actual malice on the part of the defendant. But such evidence can go only to avoid punitive damages, and not to reduce compensatory damages for injury actually sustained by the plaintiff:

Palmer vs. Mahin, 120 Fed. Rep. 737.

Where the defamatory charge is substantially established by the defendant, he is entitled to the verdict, although he may have indulged in disparaging comment, provided such comment be warranted by the facts proven:

McBee vs. Fulton, *infra,* p. 223.

Where the charge consists of matter actionable *per se,* embellished by discreditable circumstances the charge of which is not so, but which aggravate the actionable slander, the defendant succeeds in justifying if he proves the truth in fact of the actionable element of the charge, unless the plaintiff can show special damage due to the non-actionable allegations.

Golderman vs. Stearns, *infra,* p. 222.

II. **Privilege,** as a defence in cases of defamation, is Absolute or Qualified.

1. Absolute privilege is entire and unconditional immunity against liability for a defamatory publication, such immunity not depending upon the defendant's belief, good faith, or want of malice. This license to defame other persons by the malicious utterance of matter known to be false, being a highly

dangerous prerogative, is limited to persons acting in capacities concerning the substantial interests of the public, namely, the enactment of legislation, the administration of justice, and the higher functions involved in the conduct of the government. A member of Congress, or of any other legislative body, cannot be called to account in a court for what he says in debate, or perhaps in any other discourse having direct bearing upon legislation. Such a person, within such limits, may say of another what he chooses, however untrue and prompted by malice, and is responsible for the abuse of this privilege only to the house of which he is a member. So, a judge holding court, or a witness giving testimony in a judicial proceeding, may utter any slander having relation to the subject of the trial without responsibility in an action brought by the person slandered; and an attorney, in the argument of a cause, is at liberty to express any defamatory charge, provided it be relevant to the matter of the litigation and, probably, be warranted by evidence in the case:

Bradley vs. Fisher, *infra,* p. 191;
Harlow vs. Carroll, *infra,* p. 194;
Maulsby vs. Reifsnider, 69 Md. 143;
Hunckel vs. Voneiff, 69 Md. 179;
Bartlett vs. Christhilf, 69 Md. 219.

A like immunity exists in favor of certain of the higher officers of the Government:

Spalding vs. Vilas, *infra,* p. 198.

And in favor of persons dealing officially with such public functionaries in communications relative to official duties:

Vogel vs. Gruaz, *infra,* p. 196;
De Arnaud vs. Ainsworth, *infra,* p. 202;
Farr vs. Valentine, 38 App. D. C. 413.

2. Qualified or conditional privilege is the liberty, existing in certain relations, to make defamatory statements without liability, in case such statements prove untrue, unless the statement be intentionally untrue and prompted by malice.

The relations which create such privilege are those which make it the right or the duty of the person speaking to communicate a defamatory matter, which he believes to be true, to another person. The defamatory statement is privileged if it is a "comunication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a party having a corresponding interest or duty":

Harrison vs. Bush, 5 El. & Bl. 344;
Fresh vs. Cutter, *infra,* p. 206;
Brice vs. Curtis, *infra,* p. 208.

The relationship which shall constitute privilege, and the right or duty which shall justify an injurious imputation, are defined by the law and not by the opinion of the person speaking or by his conception of his own right or duty. And one who undertakes to speak disparagingly of another, although he supposes that he is only exercising a right or discharging a duty, is not protected by his own sincere supposition if that be erroneous:

Byam vs. Collins, *infra,* p. 209;
Steamboat Co. vs. Davis, *infra,* p. 213;
Bailey vs. Holland, 7 App. D. C. 184.

If one utters slanderous words on an occasion which he supposes to be privileged, but which is in law not so, and the words prove to be untrue, the untruth of the words is sufficient evidence of malice:

Bromage vs. Prosser, *infra,* p. 204;
Negley vs. Farrow, *infra,* p. 215;
Coffin vs. Brown, *infra,* p. 216.

SLANDER—Words Actionable Per Se.

Brooker vs. Coffin, 5 Johnson, 188. New York (1809).

The declaration alleged that the defendant had spoken of the plaintiff, a woman, these words: "She is a common prostitute."

By the statute at that time in force, prostitutes, along with beggars, vagrants, jugglers and fortunetellers, were declared to be disorderly persons and punishable by imprisonment at hard labor in the bridewell or house of correction. It was held that the words alleged were not actionable *per se.*

SPENCER, J.: The same statute which authorizes the infliction of imprisonment on common prostitutes, as disorderly persons, inflicts the same punishment for a great variety of acts, the commission of which renders persons liable to be considered disorderly; and to sustain this action would be going the whole length of saying that every one charged with any of the acts prohibited by that statute would be entitled to maintain an action for defamation. Among others, to charge a person with pretending to tell fortunes would, if this action is sustained, be actionable. Upon the fullest consideration, we are inclined to adopt this as the safest rule, and one which, as we think, is warranted by the cases. In the case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable; and BARON COMYNS considers the test to be, whether the crime is indictable or not. * * * There is not perhaps, so much uncertainty in the law upon any subject as when words shall be in themselves actionable. From the contradiction of cases and the uncertainty prevailing on this head, the court think they may, without overleaping the bounds of their duty, lay down a rule which will conduce to certainty; and they, therefore, adopt the rule I have mentioned as the criterion.

Judgment for the defendant.

Baker vs. Pierce, 6 Modern, 23. King's Bench (1703).

Action on the case for these words, "You stole my box-wood, and I will prove it." Verdict for the plaintiff. The defendant moved in arrest of judgment, on the ground that the words might impute a taking of standing timber, of which larceny could not be predicated.

HOLT, C. J., said the opinions of later times have been in many instances different from those of former days in relation to words; for formerly there has been a difference between saying, "Thou art a thief, and thou hast stolen my wood," and "Thou art a thief, for thou hast stolen my wood;" and judgments have gone both ways; but later opinions make no difference, if the words be spoke at the same time. And these are scrambling things that have gone backwards and forwards; and the idle people in the country that privately cut and carry away coppice wood are in common parlance called wood-stealers. And I have heard my LORD HALE and JUSTICE TWISDEN say that they knew no set rule for actions for words, but that all words stood upon their own feet. To say a man has the pox is not actionable; but to say he has it, and got it by a yellow-haired wench in Moorfields has been adjudged actionable; which latter words do not carry a violent intendment that the

speaker meant the French pox, but the sense leads more that way than to another.

And at another day, *per totam curiam* the plaintiff had judgment, for all the authorities ran clear for him.

And HOLT, C. J., said, it was not worth while to be learned on the subject; but said that, for his part, wherever words tended to take away a man's reputation, he would encourage actions for them, because so doing would contribute much to the preservation of the peace.

Pollard vs. Lyon, 91 U. S. 225. Supreme Court of the United States (1875).

This action was brought in the District of Columbia. The plaintiff, a woman, sued for these words spoken of her by the defendant: "I saw her in bed with Captain Denty; I looked over the transom-light, and saw Mrs. Pollard in bed with Captain Denty." The declaration proceeded, "whereby the plaintiff has been damaged and injured in her name and fame, and she claims damages therefor in the sum of ten thousand dollars." The declaration did not show whether the plaintiff had been, at the time of the misconduct imputed to her, married or single, nor whether Captain Denty was married. Under the law then existing in the District, such misconduct, if committed by an unmarried person with another unmarried person, was not a crime or in any way punishable criminally. The defendant pleaded not guilty, on which plea a trial was had, and the plaintiff, having proved the speaking of the words, obtained a verdict for the full amount claimed in her declaration. A motion in arrest of judgment was then made by the defendant, on the ground that the words set out in the declaration were not actionable without averment and proof of actual damage, and that the language of the declaration on that point did not import that the plaintiff had suffered actual damage from the words. This motion was sustained and the judgment arrested. Subsequently judgment was entered for the defendant, and this judgment was affirmed by the Supreme Court, that court holding that the words were not actionable *per se* and that the declaration did not sufficiently allege special damage.

CLIFFORD, J.: Different definitions of slander are given by different commentators upon the subject; but it will be sufficient to say that oral slander, as a cause of action, may be divided into five classes, as follows:

(1) Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society; or (3) Defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. (4) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5) Defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage. * * *

Certain words, all admit, are in themselves actionable, because the natural consequence of what they impute to the party is damage, as if they import a charge that the party has been guilty of a criminal offence involving moral turpitude, or that the party is infected with a contagious distemper, or if they are prejudicial in a pecuniary sense to a person in office or to a person engaged as a livelihood in a profession or trade; but in all other cases the party who brings an action for words must show the damage he or she has suffered by the false speaking of the other party.

Where the words are intrinsically actionable, the inference or presumption of law is that the false speaking occasions loss to the plaintiff; and it is not necessary for the plaintiff to aver that the words alleged amount to the charging of the described offence, for their actionable quality is a question of law, and not of fact, and will be collected by the court from the words alleged and proved, if they warrant such a conclusion. * * *

Incongruities, at least in the forms of expression, are observable in the cases referred to, when compared with each other; and when those cases, with others not cited, came to be discussed and applied in the courts of the States, the uncertainty as to the correct rule of decision was greatly augmented. Suffice it to say, that it was during the period of such uncertainty as to the rule of decision when a controversy bearing a strong analogy to the case before the court was presented for decision to the Supreme Court of the State of New York, composed, at that period, of some of the ablest jurists who ever adorned that bench.

Allusion is made, in the opinion given by JUDGE SPENCER, to the great "uncertainty in the law upon the subject;" and, having also adverted to the necessity that a rule should be adopted to remove that difficulty, he proceeds, in the name of the court, to say, "In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject the party to an infamous punishment, then the words will be in themselves actionable;" and that rule has ever since been followed in that State, and has been very extensively adopted in the courts of other States. Brooker vs. Coffin, 5 Johns. 190; 1 Am. Lead. Cas. (5th Ed.), 98.

When he delivered the judgment in that case, he was an associate justice of the court; CHANCELLOR KENT being the chief justice, and par-

ticipating in the decision. Fourteen years later, after he became chief justice of the court, he had occasion to give his reasons somewhat more fully for the conclusion then expressed. Van Ness vs. Hamilton, 19 Johns, 367. * * *

Special damage is a term which denotes a claim for the natural and proximate consequences of a wrongful act; and it is undoubtedly true that the plaintiff in such a case may recover for defamatory words spoken of him or her by the defendant, even though the words are not in themselves actionable, if the declaration sets forth such a claim in due form, and the allegation is sustained by sufficient evidence; but the claim must be specifically set forth, in order that the defendant may be duly notified of its nature, and that the court may have the means to determine whether the alleged special damage is the natural and proximate consequence of the defamatory words alleged to have been spoken by the defendant. Hadden vs. Scott, 15 B. C. 429.

Whenever proof of special damage is necessary to maintain an action of slander, the claim for the same must be set forth in the declaration, and it must appear that the special damage is the natural and proximate consequence of the words spoken, else the allegation will not entitle the plaintiff to recover. Vicars vs. Wilcox, 8 East. 3; Knight vs. Gibbs, 1 Ad. & Ell. 46; Ayre vs. Craven, 2 Id. 8; Roberts vs. Roberts, 5 B. & S. 389.

When special damage is claimed, the nature of the special loss or injury must be particularly set forth, to support such an action for words not in themselves actionable; and, if it is not, the defendant may demur. He did demur in the case last cited; and COCKBURN, C. J., remarked that such an action is not maintainable, unless it be shown that the loss of some substantial or material advantage has resulted from the speaking of the words. Addison on Torts (3rd Ed.), 805; Wilby vs. Elston, 8 C. B. 148. * * *

By special damage in such a case is meant pecuniary loss; but it is well settled that the term may also include the loss of substantial hospitality of friends. Moore vs. Meagher, 1 Taunt. 42; Williams vs. Hill, 19 Wend. 306.

Illustrative examples are given by the text-writers in great numbers, among which are loss of marriage, loss of profitable employment, or of emoluments, profits, or customers; and it was very early settled that a charge of incontinence against an unmarried female, whereby she lost her marriage, was actionable by reason of the special damage alleged and proved. Davis vs. Gardiner, 4 Co. 16 b. pl. 11; Reston vs. Pomfreicht, Cro. Eliz. 639.

Doubt upon that subject cannot be entertained: But the special damage must be alleged in the declaration, and proved; and it is not sufficient to allege that the plaintiff "has been damaged and injured in her name and fame," which is all that is alleged in that regard in the case before the court. Hartley vs. Herring, 8 Term. 133; Addison on Torts, 805; Hilliard on Remedies (2nd Ed.), 622; Beach vs. Ranney, 2 Hill, 309.

Hellwig vs. Mitchell, L. R. 1910, 1 K. B. 609. King's Bench Division (1910).

Case set down in the special paper for argument as to whether the statement of claim disclosed any cause of action.

The statement of claim was as follows:

"(1) The plaintiff is a hair dresser carrying on business at 37 Walbrook, in the City of London, and residing No. 17 Cotswold Road, Westcliff, in the county of Essex. The defendant is the manager of the Palace Hotel, Southend, in the said county of Essex.

"(2) On November 1, 1909, at the aforesaid Palace Hotel, the defendant falsely and maliciously spoke and published of and concerning the plaintiff to one Aubrey Bagnald, to one Frank Bagnald, and to divers other persons then present in the said Hotel, but whose names are not known to the plaintiff, the words following, that is to say: 'I cannot have you in here; you were on the premises last night with a crowd, and you behaved yourself in a disorderly manner and you had to be turned out.' Upon the plaintiff protesting that the defendant had made a mistake and that he (the plaintiff) was not in Southend on the previous evening, the defendant further said in the aforesaid circumstances: 'Oh, no, I have not made a mistake, and there are plenty of people here now who saw you and the disorderly way in which you behaved; you have to go out at once; and if you don't go I shall call the police, and have you turned out.'

"(3) By the said words the defendant meant and was understood to mean that the plaintiff had been guilty of disorderly conduct, of committing breaches of the peace and refusing to quit licensed premises, having thereby committed criminal offenses, and that he was not a fit person to associate with respectable people and was incapable of behaving in a rational or decent manner.

"(4) By reason of the premises the plaintiff has been held up to public ridicule, odium and contempt, and has suffered damage to his credit and reputation.

"The plaintiff claims £250 damages."

Bray, J.: This case is by no means free from doubt. The question is whether the statement of claim discloses any actionable wrong. In the

absence of special damage slander is only actionable in certain cases, one of which is where the words impute the commission of a criminal offense punishable by imprisonment.

The first point taken on behalf of the plaintiff is that the words alleged in the statement of claim are capable of meaning that the plaintiff was a party to an unlawful assembly, which is an offence punishable with imprisonment. I do not think that without some special innuendo and special evidence the words convey an imputation of that sort, but it may be that, if there had been a special innuendo pleaded, that the words meant that the plaintiff had been a party to an unlawful assembly, I might have thought that there was a question for the jury. The actual innuendo pleaded in the statement of claim does not, in my opinion, allege that the plaintiff had ben guilty of being a party to an unlawful assembly.

It was next said that the slander imputed to the plaintiff that he had been guilty of being drunk and disorderly, which is an offense punishable with imprisonment. But there is not a word in the slander imputing drunkenness to the plaintiff, and the words are not capable of bearing that meaning, nor is that meaning alleged in the innuendo. Therefore, both these points fail.

Lastly it was contended that the words are capable of bearing the meaning alleged, namely, that the plaintiff had been guilty of disorderly conduct and of committing breaches of the peace, and it was said that a person who commits a breach of the peace may be arrested either by a private individual or by a constable. That is true, but the offence is not punishable by imprisonment. It was contended, however, that the rule does not require that the criminal offence should be one punishable by imprisonment, and that it is sufficient if the offence be one which renders the offender liable to summary arrest and detention. This is not a question of principle, but of judge-made-law, and therefore I must look at the authorities to see how far they support this contention. The first case to which I will refer is *Webb vs. Beavan*, 11 Q. B. D. 609, in which the court had to consider the question whether it is necessary to allege that the words impute an indictable offence, and it was held that it was not necessary. POLLOCK, B., in giving judgment, said: "The expression 'indictable offence' seems to have crept into the text-books, but I think the passage in Comyn's Digest is conclusive to show that words which impute any criminal offence are actionable *per se*. The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally." Those last words are, undoubtedly, somewhat ambiguous and may be wide enough to include an offence which, though not punishable by imprisonment, renders the offender liable to arrest. The judgment of LOPES, J., in *Webb vs. Beavan*, does not carry the matter any further. The next case is *Michael vs. Spiers & Pond, Ltd.*, 25 Times L. R. 740, where it was contended by counsel for the plaintiff that "the joint effect of sec. 12 of the Licensing Act, 1872, and sec. 5 of the Summary Jurisdiction Act, 1879, was to make

drunkenness on licensed premises an offence which exposed the person committing it to punishment corporally. The plaintiff under sec. 1 of the Licensing Act, 1902, was liable to be dealt with corporally on the spot, and therefore this was a slander which was actionable *per se*." It appears, therefore, that the argument which has been raised here was also raised in *Michael vs. Spiers & Pond, Ltd.*, but A. T. LAWRENCE, J., apparently did not find it necessary to decide the point, for he held that there was no imputation of an offence within sec. 1 of the Licensing Act, 1902, but he used these words: "As, therefore, there is no imputation of an indictable offence or of an offence for which a person can be made to suffer corporally by way of punishment, I think special damage is necessary." That is a dictum that the corporal suffering must be by way of punishment. I cannot find in the books a trace of authority for saying that words imputing that the plaintiff has done an act for which he may be arrested, but which is only punishable by a fine, are actionable without proof of special damage, or that a mere liability to arrest is sufficient to make the crime one for which the offender can be said to suffer corporally. Strictly speaking, it is incorrect to say that a person who commits a breach of the peace can be made to suffer corporally. The arrest in that case is not a punishment; it is merely a method of preventing the continuing of the offence.

I am of opinion that it is not desirable to extend the list of actionable wrongs, and for the reasons which I have given I come to the conclusion that the statement of the claims discloses no actionable wrong, and the action must therefore be dismissed with costs.

Webb vs. Beavan, 11 Q. B. Div. 609. Queen's Bench (1883).

Demurrer to statement of claim. Action for slander. The statement of claim alleged that the defendant maliciously and falsely spoke and published of plaintiff the words following: "I will lock you (meaning the plaintiff) up in Gloucester jail next week. I know enough to put you (meaning the plaintiff) there (meaning thereby that the plaintiff had been and was guilty of having committed some criminal offense or offenses)." Defendant demurred on the ground that the statement of claim did not allege circumstances showing that the defendant had spoken or published of the plaintiff any actionable language, and that no cause of action was disclosed.

POLLOCK, B.: I am of opinion that the demurrer should be overruled. The expression "indictable offense" seems to have crept into the text books, but I think the passages in Comyn's Digest are conclusive to show that words which impute any criminal offense are actionable *per se*. The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he may be made to suffer corporally.

Brown vs. Nickerson, 5 Gray, 1. Massachusetts (1855).

Brown said of Mrs. Nickerson, "She drinks rum and gets drunk, and she got drunk and laid drunk a week. She is mad with the neighbors because they will not let her have liquor. She will get drunk whenever she can get liquor." *Held*, that a charge either of habitual drunkenness, punishable by confinement, or of drunkenness in a single instance, being punishable by a fine, is actionable, as either punishment would bring disgrace upon the person so charged.

METCALF, J.: By the law of this Commonwealth (however it may be elsewhere), it is actionable to charge a person falsely and maliciously with an offence that may subject him to a punishment which will bring disgrace upon him, though the punishment be not in itself infamous. Miller vs. Parish, 8 Pick. 385. In that case it was decided that a charge against a woman, of an offense that was then punishable by a small fine, was actionable; a punishment of that offense necessarily bringing her into disgrace. And that case is decisive of this. For whether the charge, which this demurrer admits, that the defendant falsely and maliciously made against the female plaintiff, be that she was a common drunkard, punishable by confinement in the House of Correction (Rev. Sts., ch. 143, sec. 5), or only that she was once drunk by the voluntary use of intoxicating liquor, and punishable by a fine of five dollars (Rev. Sts. ch. 130, sec. 13), the charge is actionable; for the punishment of a woman for either offense must bring disgrace upon her.

Shafer vs. Ahalt and His Wife, 48 Md. 171 (1878).

Shafer told some one that Mrs. Ahalt had committed adultery with him. Hearing of this imputation upon her made Mrs. Ahalt very ill, and her husband was compelled to expend money for doctors and nurses. At that time in Maryland adultery was a criminal offence, but punishable only by a fine. This action was brought by Mr. and Mrs. Ahalt to recover damages for the slander of the wife.

Held, that the plaintiff could not recover, because,

1st. The misconduct ascribed to Mrs. Ahalt, being punishable only by a fine and not by imprisonment or other corporal punishment, was not one of the offences the false imputation of which is actionable *per se:* and,

2nd. The illness of Mrs. Ahalt and the expense thereby occasioned were not special damage, such consequences not being reasonably to be anticipated as flowing from the slander uttered by the defendant.

ROBINSON, J.: In suits for slander, pecuniary loss to the plaintiff is *the gist of the action.* * * * The court at an early time recognized a distinction between words *actionable* and words *not actionable in themselves.* In the former, the law presumed pecuniary loss, while in the latter, it was necessary in addition to the words, to prove *special damage* to the plaintiff. Whatever difficulty there may be in defining the precise line of demarcation between these actions, it is well settled, that where one charges another with the commision of an offense, it must be

such an offense as subjects the party to corporal punishment, in order to render the words actionable *per se*. * * * In this State, adultery is punishable by a *pecuniary fine*, and to charge one with the commission of the offense is therefore not actionable *per se*.

This is a suit * * * to recover damages . . . and the question is whether the sickness of the wife resulting from the slanderous charge is sufficient to prove special damages. In cases of this kind special damage is that which is naturally the consequence of the words spoken. Allsop vs. Allsop, 2 L. T. Rep., N. S. 290. Now it can not be said that sickness is the *natural consequence* of defamatory or slanderous words. Such might or might not be the result, depending in a great measure upon the sensibilities and temperament of the person.

The rule of law in regard to special damage was adopted with reference to common and usual effects and not such as are occasional and accidental.

Pett-Morgan vs. Kennedy, 62 Minn. 348 (1895).

In view of the moral sentiment of the people of this State on the subject of drunkenness, so pronounced as to lead to the enactment of the Scheffer Law in 1889, we do not hesitate to say that moral turpitude is involved in the charge that a man has been getting other people drunk, and has himself been on a drunken debauch lasting for a week. The words uttered, according to the complaint, were actionable *per se*.

Davis vs. Carey, 141 Pa. St. 314 (1891).

CLARK, J.: Upon the question what words containing the imputation of a crime are actionable, without proof of special damages, the cases in this court are in some apparent confusion. They are not contradictory. The course of decision is entirely consistent; the confusion arises from what has been said, not what was decided. The cases are in accord that such words are not actionable unless they import an offence indictable and punishable either at common law or by statute. *Harvey vs. Boies*, 1 P. & W. 12; *Lukehart vs. Byerly*, 53 Pa. 418; but this is not a criterion; *Klumph vs. Dunn*, 66 Pa. 141.

In *Miles vs. Oldfield*, 4 Yeates, 423, the words were, "You are a vagrant." It was objected that these words were not actionable, but this court said: "The Act of February, 1767, defines the nature of vagrancy, and authorizes a justice of the peace to commit vagrants to the common jail, there to be kept at hard labor for any time not exceeding one month. To charge a person with an offence which subjects him to punishment of this kind is, in the opinion of the court, actionable." This case may, however, be distinguished from others in this, that it was not only averred in the declaration, but it was proved, in the nature of a special injury, that in consequence of the words spoken the plaintiff was apprehended and taken before the justice of the peace as an idle and disorderly person, and thereby suffered damage. In *Shaffer vs. Kintzer*, 1 Binn. 542, CHIEF JUSTICE TILGHMAN says: "With regard to words which will support an action of slander, I take

the rule to be as laid down by C. J. DEGREY, in the case of *Onslow vs. Horne*, 3 Wils. 186, in the year 1771, which is an authority in this court. They must contain an express imputation of some crime liable to punishment, some capital offence, or other infamous crime or misdemeanor. But in *Brown vs. Lamberton*, 2 Binn. 34, the crime charged was adultery, and in *Walton vs. Singleton*, 7 S. & R. 449, it was fornication merely. No special damage was laid in either case, and it was held that the words were actionable. To the same effect are *Reier vs. Bushfield*, 1 W. 23; *Vanderlip vs. Roe*, 23 Pa. 82; *Klump vs. Dunn*, 66 Pa. 141; *Rhoads vs. Anderson*, 12 Cent. R. 727, 12 Atl. 823. To call a woman a whore or an adulteress is actionable; the punishment is not infamous, but it is actionable, because it is a charge of impurity, depravity and moral turpitude. * * *

From this reference to a few of the cases, it is clear that when MR. JUSTICE CHURCH, in *Gosling vs. Morgan*, 32 Pa. 273, said that the undisturbed authority of the leading cases of *Shaffer vs. Kintzer*, 1 Binn. 537; *McClurg vs. Ross*, 5 Binn. 218, and *Andres vs. Koppenheafer*, 3 S. & R. 255, establishes the principle, that words spoken of a private person are only actionable when they contain a plain imputation, not merely of some indictable offence, but one of an infamous character or subject to an infamous and disgraceful punishment, the word "infamous" could not have been used in its technical but rather in its popular sense. The only crimes which work infamy and consequent incompetency as a witness, are treason, felony, and every species of the *crimen falsi*, such as forgery, perjury, subornation of perjury, attaint of false verdict, and other offences of like description, which involve the charge of falsehood and affect the public administration of justice: *Commonwealth vs. Shaver*, 3 W. & S. 342; *Schuylkill Co. vs. Copley*, 67 Pa. 390. The profession would certainly be greatly surprised to learn that slanderous words are, in Pennsylvania, actionable only when they impute a crime of this class. Our books are full of cases to the contrary.

The English rule is spoken words, which impute that the plaintiff has been guilty of a crime punishable with imprisonment, are actionable, without proof of special damage: Ogder on Sland. & L. 54, and cases there cited. But, in the American cases, importance is attached to the inherent nature of the indictable act, and also to the punishment which the law assigns to it, upon the principle that social degradation may result from either.

The plaintiff in this case was charged with burning his own mill, to defraud the insurance companies. The offense involves moral turpitude; it is of a base, and in a popular sense infamous character. It is punishable by separate and solitary confinement at labor in the penitentiary, for a period not exceeding seven years, which is a disgraceful punishment, inflicted on infamous offences. The words alleged to have been spoken were therefore, without doubt, actionable *per se*, and upon this ground.

Fowler vs. Dowdney, 2 Moody & R. 119. Nisi Prius (1838).

Slander for saying of the plaintiff, "He is a returned convict."

The declaration averred as special damage the loss of a customer to whom the words were spoken, the plaintiff being a tradesman. The proof of the special damages failed, and thereupon, Erle, counsel for the defendant, contended that the words were not actionable in themselves, inasmuch as they imputed no present liability to punishment; for, conceding that an offense, for which transportation was the punishment, was imputed, the words imply that the party had already suffered that punishment.

LORD DENMAN, C. J.: My opinion is that the words are actionable, because they impute to the plaintiff that he has been guilty of some offence for which parties are liable to be transported. That is, I think, the plain meaning of the words as set out in the declaration; they import, to be sure, that the punishment has been suffered, but still the obloquy remains. *Verdict for the plaintiff.*

Crittal vs. Horner, Hobart, 219. Common Pleas (1618).

Crittal brought an action of the case against Horner for saying that he had caught the French pox and had carried them home to his wife, and had judgment; the slander is not in the wicked means of getting them, but in the odiousness of the infection, as a leper: 2 Cro. 144; 1 Roll. 44.*

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*"In early times, when a person became afflicted with leprosy, he was deemed to be legally dead and lost the privileges of citizenship. The Church took the same view, and, on the day when the sufferer was consigned for life to the lazar house, performed over him the various solemn ceremonies observed in the burial of the dead. As the leper was subject to the writ *de leproso amovendo*, the accusation of leprosy, as well as the accusation of crime, might be held actionable, and upon the same ground. Persons suspected of having the plague were likewise removed to pest-houses and confined. To account for the charge of having syphilis is more difficult. Whether, upon the appearance of this disease in the fifteenth century, it was regarded as contagious, and so exposed the sufferer to a writ like the writ *de leproso*, or whether the disease was so similar in its outward manifestations to the form of leprosy then prevailing in England, can only be conjectured. It was a disease quite prevalent among the clergy, and there is abundant evidence to show that it was considered no more disgraceful than any other severe disorder." Veeder, History of the Law of Defamation, Columbia Law Rev., v. 4, p. 38.

Carslake vs. Mapledoram, 2 T. R. 473. King's Bench (1788).

The plaintiff was a woman, and of her the defendant said: "I have kept her common these seven years; she hath given me the bad disorder, and three or four other gentlemen besides."

Held, that the words were not actionable.

ASHHURST, J.: Charging a person with having committed a crime is actionable, because the person charged may still be punished; it affects him in his liberty. But charging another with having had a contagious disorder is not actionable; for unless the words spoken impute a continuance of the disorder at the time of speaking them, the gist of the action fails; for such a charge can not produce the effect which makes it the subject of an action, namely, his being avoided by society. Therefore, unless some special damage be alleged in consequence of that kind of charge, the words are not actionable.

Words Not Actionable Per Se.

Ayre vs. Craven, 2 Ad. & Ell. 2, King's Bench (1834).

Action for words imputing incontinence to the plaintiff, who was a physician. The language used did not imply that the alleged misconduct was committed in the course of the plaintiff's professional practice or was made possible by his professional relations. No special damage was proved.

Held, that the words were not actionable, the imputation of incontinence not being in itself generally so, and the particular charge not having relation to the plaintiff in his profession.

LORD DENMAN, C. J.: There are obvious and very good reasons for the jealousy with which the courts have always regarded actions for slander, particularly those in which no indictable offence has been imputed; but here the plaintiff states the grievance as affecting him in his business, office or profession, without charging that any actual damage has accrued to him from the words spoken.

Some of the cases have proceeded to a length which can hardly fail to excite surprise: a clergyman having failed to obtain redress for the

imputation of adultery [Parratt vs. Carpenter, Cro. Eliz. 502];* and a school mistress having been declared incompetent to maintain an action for a charge of prostitution [per TWISDEN, J., in *Wharton vs. Brook*, 1 Ventris, 21]. Such words were undeniably calculated to injure the success of the plaintiffs in their several professions, but, not being applicable to their conduct therein, no action lay.

The doctrine to be deduced from the older cases was recently laid down, after full discussion, by MR. BARON BAYLEY [in *Lumby vs. Allday*, 1 Cr. & J. 305, in 1831]: "Every authority which I have been able to find either shows the want of some general requisite, as honesty, capacity, fidelity, etc., or connects the imputation with the plaintiff's office, trade or business."

In that case, accordingly, where a verdict had been recovered by a clerk of a gas company, on a declaration alleging that the defendant, wishing to cause it to be believed that the plaintiff was unfit to hold his situation, and to cause him to be deprived of it, had said to him: "You are unfit to hold your situation," and then imputed incontinence as the reason of his unfitness, the Court of Exchequer thought the judgment ought to be arrested.

In the present case, much doubt was entertained whether the words were not actionable within the rule just adverted to. For, being laid as spoken of the plaintiff as a physician, in which character he may have opportunities of abusing the confidence reposed in him, to commit acts of criminal conversation, the statement must be thought large enough to admit such proof to be adduced on the trial, in which case the necessary proof would be presumed to have been given, and the judgment ought not to be arrested. But, after full examination of the authorities, we think that, in actions of this nature, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession. For this defect the judgment must be arrested.

Lumby vs. Allday, 1 Cr. & J. 301. Exchequer (1831).

The plaintiff was a clerk to a gas light company, and to him the defendant declared: "You are a fellow, a disgrace to the town, unfit to hold your situation for your conduct with whores." In holding these words not actionable *per se* affecting the plaintiff in his occupation, BAYLY, B., said: "The imputation does not affect him in his situation of

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*Parratt vs. Carpenter, Cro. Eliz. 502, cited above, was in effect overruled in Dod vs. Robinson, Aleyn, 63, in 1648, holding that the imputation of incontinence to a beneficed clergyman is actionable *per se*, since the conduct charged is ground for depriving him of his benefice. In Payne vs. Beaumorris, 1 Levinz, 248, the same charge against one who was chaplain to a peer was held actionable *per se*, on the ground that the chaplainship was an office of temporal profit. But, where the plaintiff, although in holy orders, did not have a benefice or other employment of pecuniary advantage, the same imputation was held not in itself actionable; Gallwey vs. Marshall, 9 Exch. 294 (1853). In the United States, where there is no established church, charges of gross immorality against clergymen are generally held actionable: McMillan vs. Birch, 1 Binney, 178.

clerk, and are equally actionable whether they were spoken of the plaintiff or in his private capacity. Words, to be actionable by reason of an imputation upon the plaintiff's trade, must be spoken of him in his trade and with reference to his trade. They must either impute some misconduct in his trade, which renders him unfit for his situation, or be calculated to injure him in his trade. It is consistent with this imputation that the plaintiff might have conducted himself honestly to the company and have faithfully and efficiently performed his duty; and, therefore, the words cannot be actionable as spoken of the plaintiff in his trade."

Friedlander vs. Rapley, 38 App. D. C. 208.

Rapley conducted a theatre, and Friedlander purchased tickets for a certain performance therein, presented himself at the appointed time, and was assigned to the allotted seat. Shortly afterwards he was summoned to the office of the theatre, and one Fowler, agent of Rapley, addressed him thus in the presence of a number of persons: "These tickets are dated December 1st. You must have gotten them in some crooked way. You have done this crooked work before and we don't want you to come into this theatre again; and you can't come into this office any more. You crumpled up these tickets, so that I could not see the date; this incident is closed with me." No special damage was alleged, and upon demurrer to the declaration it was held bad. It was contended on behalf of the plaintiff that the remarks of Fowler imputed the commission of a crime, the obtaining of money by false pretences.

SHEPARD, C. J.: These words are abusive, and convey the meaning that plaintiff had in a crooked way—that is to say, by trick or artifice—obtained entrance into the theatre. Persons of ordinary understanding, hearing them uttered and giving them credence, would understand that the plaintiff was a trickster and a crook or fraud, but we do not think that they would understand that he was charged with the indictable offense of false pretences. * * * They are, therefore, not actionable *per se*. Any special damage resulting therefrom must have been specially alleged.

* * * The court was right in holding that the several counts of the declaration did not state a cause of action, and the demurrer was, therefore, properly sustained.

Special Damage.

Moore vs. Meagher, 1 Taunton, 39. Exchequer Chamber (1807).

The plaintiff, a woman, in her declaration, alleged that, by reason of her good conduct and reputation, she had "enjoyed the society, conversation, friendship and countenance of many worthy and estimable subjects of this realm; . . . and was, by

divers of those persons, received and entertained in their respective houses, and found and provided by them, respectively, with meat and drink, gratuitously, and without any price or sum of money whatsoever by her paid or payable for the same, to the great reduction of her necessary expenses of living and maintaining herself, and the great increase of her riches." The declaration proceeded to show that the defendant had spoken words imputing incontinence to the plaintiff, by means of which words she was greatly injured in her reputation, and many of the aforesaid friends "had wholly refused to hold or permit any intercourse or society with her, or to receive and admit her into their respective houses or company, or to find or provide for her meat, drink, or any other benefits and advantages in any manner whatsoever, as they before that time had done and otherwise would have continued to do; whereby the plaintiff had lost all those valuable benefits and advantages, being to her theretofore of great value, to wit, of the value of £100, and had been greatly reduced and prejudiced in her fortunes and pecuniary circumstances, and obliged to incur a much greater expense in her necessary living and supporting herself, to a large amount, to wit, the annual amount of £100, than she theretofore had done, and otherwise would have continued to do."

Held, that the declaration sufficiently stated special damage.*

SIR JAMES MANSFIELD, C. J.: We do not know how to say that this is not a special damage, sustained in consequence of words imputing infamy. They have deprived this lady of an income derived from the bounty of others, which now, after verdict, we must assume would have continued if the defendant had not spoken these words.

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*"As to what constitutes special damages, Starkie mentions the loss of a marriage, loss of hospitable gratuitous entertainment, preventing a servant or bailiff from getting a place, the loss of customers by a tradesman, and says that, in general, whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient (1 Starkie on Slander, 195, 202; Cook's Law of Def. 22-24). In Olmsted vs. Miller, 1 Wendell, 506, it was held that the refusal of civil entertainment at a public house was sufficient special damage. So in Williams vs. Hill, 19 Wendell, 305, was the fact that the plaintiff was turned away from the house of her uncle and was told not to return until she had cleared up her character. So in Beach vs. Ranney, 2 Hill, 309, was the circumstance that persons, who had been in the habit of doing so, refused longer to provide fuel, clothing, etc. These instances are sufficient to illustrate the kind of special damage that must result from defamatory words, not otherwise actionable, to make them so; they are damages produced by, or through, impairing the reputation"; Terwilliger vs. Wands, 17 N. Y. 54 (1858).

Terwilliger vs. Wands, 17 N. Y. 54 (1854).

The defendant had circulated a report to the effect that the plaintiff, a farmer, had been guilty of adultery, such a charge not being, under the existing law, actionable without proof of actual damage resulting therefrom. A third person informed the plaintiff, who was working in his field, that such a report was current. The plaintiff thereupon threw down his hoe, left the field, took to his bed, and was for some time ill from debility which was shown by medical testimony to be caused by mental trouble. Terwilliger brought an action for slander on account of the defamation, alleging as special damages the illness occasioned by the report.

Held, that such illness was not the natural or probable result of the slander so as entitle the plaintiff to recover as for actual damage.

STRONG, J.: It would be highly impolitic to hold all language, wounding the feelings and affecting unfavorably the health and ability to labor, of another, a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him, and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages, and a clear and wise one has been fixed by the law. The words must be defamatory in their nature, and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result. In this view of the law, words which do not degrade the character, do not injure it and cannot occasion loss. * * *

In the present case, the words were defamatory, and the illness and physical prostration of the plaintiff may be assumed, so far as this part of the case is concerned, to have been actually produced by the slander; but this consequence was not, in a legal view, a natural, ordinary one, as it does not prove that the plaintiff's character was injured. The slander may not have been credited by, or had the slightest influence upon, any one, unfavorable to the plaintiff; and it does not appear that anybody believed it or treated the plaintiff any different from what they would otherwise have done on account of it. The cause was not adapted to produce the result which is claimed to be special damages. Such an effect may, and sometimes does, follow from such a cause, but not ordi-

narily; and the rule of law was framed in reference to common and usual effects, and not those which are accidental and occasional.

It is true that this element of the action for slander in the case of words not actionable in themselves—that the special damages must flow from impaired reputation—has been overlooked in several modern cases; and loss of health and consequent incapacity to attend to business held sufficient special damage: Bradt vs. Towsley, 13 Wend. 253; Fuller vs. Fenner, 16 Barbour, 333; but these cases are a departure from principle and should not be followed.

Where there is no proof that the character has suffered from the words, if sickness results, it must be attributed to apprehension of loss of character; and such fear of harm to character, with resulting sickness and bodily prostration, cannot be such special damage as the law requires for the action. The loss of character must be a substantive loss, one which has actually taken place.

Allsop vs. Allsop, 5 H. & N. 534. Exchequer (1860).

The plaintiffs, husband and wife, sued for words uttered by the defendant and imputing incontinence to the wife, alleging that in consequence of the words Mrs. Allsop had lost the society of her friends and neighbors, that she had been much injured in her credit and reputation and brought into public scandal and disgrace, and that by reason of the words she became ill and so remained for a long time, and was unable to attend to her necessary affairs and business, whereby Mr. Allsop had been put to great expense and had been deprived of his wife's assistance and society.

This declaration was, on demurrer, held bad as not stating any special damage.

BRAMWELL, B.: No such special damage ever was heard of as a ground of action. If it were so, I am at a loss to see why mental suffering should not be so likewise. It is often adverted to in aggravation of damages, as well as pain of body. But if so, all slanderous words would be actionable. Therefore, unless there is a distinction between the suffering of mind and the suffering of body, this special damage does not afford any ground of action. There is certainly no precedent for such an action, probably because the law holds that bodily illness is not the natural nor the ordinary consequence of the speaking of slanderous words.

LIBEL.

Cropp vs. Tilney, 3 Salkeld, 225. King's Bench (1694).

The plaintiff being a candidate for election to Parliament, the defendant published a written article asserting that the plaintiff had declared:

"There is a war with France, of which I can see no end unless the young gentleman on the other side of the water (*innuendo* the Prince of Wales) be restored."

The Prince of Wales was then in France, having been taken abroad when his father, James II., was expelled from the throne in 1688. The words, therefore, imputed disloyalty to the existing government; and the plaintiff alleged that, by reason of the charge so made against him, he had failed of election. It was objected, on behalf of the defendant, "that here was no scandal," that is, the words did not import such an imputation as, if spoken, would be actionable *per se*. But LORD HOLT, C. J., said:

"Scandalous matter is not necessary to make a libel; 'tis enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous. As, for instance, an action was brought by the husband for riding Skimmington, and adjudged that it lay, because it made him ridiculous and exposed him. Every man understands who is meant by the young gentleman on the other side the water. If words are false, the defendant may justify in an action, but not in an indictment."*

Peck vs. Tribune Co., 214 U. S. 185 (1909).

The plaintiff was a young woman, who was not Mrs. Schuman and not a nurse, and who did not use alcoholic liquor. The Chicago Tribune published a photograph of the plaintiff, with the words, "Mrs. A. Schumann," under it, and followed by a sentence, purporting to be signed by Mrs. Schumann, and reading, "After years of constant use of your Pure Malt Whiskey, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic

*PARKE, B.: "A libel is anything written or printed which, from its terms, is calculated to injure the character of another, by bringing him into hatred, contempt or ridicule, and which is published without lawful justification or excuse." Gathercole vs. Miall, 15 M. & W. 319 (1846).

"The reason why the law punisheth libels is, for that they tend to raise a breach of the peace. * * * It hath ever been agreed that it is not the matter but the manner that is punishable; for libelling against a common strumpet is as great an offence as against an honest woman, and perhaps more dangerous to the breach of the peace; for, as the woman said, she would never grieve to have been told of her red nose if she had not one indeed, neither is it ground to examine the truth or falsehood of a libel; for that takes away *subjectum quaestionis*, and determines it to be no libel by admitting the defendant to prove the truth." Hudson, Treatise on the Star Chamber, 107.

and stimulant, etc." *Held,* that the publication as made imported that the plaintiff was Mrs. Schumann and a nurse, and that she used Duffy's Whiskey; and that the publication was libellous.

HOLMES, J.: The question then is, whether the publication was a libel. It was held by the Circuit Court of Appeals not to be, or, at most, to entitle the plaintiff only to nominal damages, no special damage being alleged. It was pointed out that there was no general consensus of opinion that to drink whiskey is wrong or that to be a nurse in discreditable. It might have been added that very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. But it appears to us that such inquiries are beside the point. * * * If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote. * * * But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about, or even known, by all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm. Thus, if a doctor were represented as advertising, the fact that it would affect his standing with others of his profession might make the representation actionable, although advertising is not reputed dishonest, and even seems to be regarded by many with pride. See Martin vs. The Picayune, 115 La. 119; 4 L. R. A., N. S. 861. It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore, it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all it could ask if it had been permitted to persuade them, if it could, to take a contrary view.

Villers vs. Monsley, 2 Wilson, 403. Common Pleas (1769).

Monsley was sued by Villers for publishing some verses which included these couplets:

> Old Villers, so strong of brimstone you smell,
> As if not long since you had got out of hell; . . .
> You old stinking, old nasty, old itchy old toad,
> If you come any more, you shall pay for your board.

The plaintiff having obtained a verdict for 6d., Sergeant Borland moved in arrest of judgment on the ground that the imputation of having the itch was not actionable, the learned counsel observing that this distemper is one to which every family is liable, and that to have it is no crime and implies no discredit, since it may be quite innocently come by. But the court considered the verses actionable *per se* and rendered judgment on the verdict.

WILMOT, L. C. J.: If any man deliberately and maliciously publishes anything in writing concerning another which renders him ridiculous, or tends to hinder mankind from associating or having intercourse with him, an action will lie against such publisher. I see no difference between this and the case of the leprosy and plague; and it is admitted that an action lies in those cases. The writ *de leproso amovendo* is not taken away, although the distemper is almost driven away by cleanliness or new-invented remedies; the party must have the distemper to such a degree before the writ shall be granted, which commands the sheriff to remove him without delay *ad locum solitarium ad habitandum ibidem prout moris est, ne per communem conversationem suam hominibus dampnum vel periculum eveniat quovismodo.* * * * Nobody will eat, drink or have any intercourse with a person who has the itch and stinks of brimstone; therefore, I think this libel actionable.

CLIVE: I am of the same opinion, that this is a very malicious and scandalous libel.

GOULD, J.: There is a distinction between libels and words; a libel is punishable both criminally and by action, when speaking the words would not be punishable in either way; for speaking the words *rogue* and *rascal* of anyone an action will not lie; but if those words were written and published of anyone, I doubt not an action would lie. If one man should say of another that he has the itch, without more, an action would not lie; but if he should write those words of another and publish them maliciously, as in the present case, I have no doubt at all but the action well lies. * * * I think the publishing anything of a man that renders him ridiculous is a libel and actionable.

Levi vs. Milne, 4 Bingham, 195. Common Pleas (1827).

The plaintiff was a sheriff's officer or bound bailiff, which latter title was corrupted in popular speech into bum bailiff. He had on one occasion received for execution a writ of *capias*, for which purpose he went to the house of the person named in the writ and knocked at the door. A servant answered the knock and informed Levi that the person desired was not at home. Disbelieving the servant, Levi entered the house, went upstairs, and undertook to search a bed-room. As he observed that somebody was in the bed and concealed by the bed clothes, Levi turned them up, whereupon it appeared that the person in bed was a woman. This discovery caused the officer to run away; and afterwards he was sued for the trespass and obliged to pay a judgment of £100. The defendant published an account of the plaintiff's misadventure in several stanzes of doggerel, such as these:

"Is the master at home?"
Says L—y the bum.
"No master lives here—mine's the house you see."
"Nay, Ma'am, that's a hum,"
Says L—y the bum.
So upstairs he marched right merrily.

The chamberdoor
Was locked—but no more
Cared L—y the bum for lock or key
Than winebibbers for the cork
They can draw with a fork,
So smash went the door, and in walked he.

Then off he pulled neat
Quilt, blanket and sheet;
But, instead of the bird he would seize in his nest,
They saw with surprise
A white neck and black eyes,
Ripe lips, rosy cheeks and a heaving breast.

The remainder of the composition was of like literary merit, and celebrated the bailiff's discomfiture and pecuniary disaster in a spirit of like delicacy. Levy sued the publisher, suggesting that the verses were libellous. The trial judge told the jury that the publication was clearly a libel, "being calculated to render the plaintiff ridiculous and to occasion pain to his feelings." The jury, however, found a verdict for the defendant. On motion for a new trial, the verdict was set aside and a new trial was granted. It will be observed that the publication was, substantially at least, a correct statement of what had occurred.

PARK, J.: If the law be, as laid down by WILMOT, J., BATHURST, J., and the rest of the court in Villers vs. Monsley, 2 Wilson, 403, and as it has always been held—that whatever is published of a man tending to make him ridiculous or to prevent others from associating with him is a libel—I am clear that the present publication is a gross and scandalous libel.

BURROUGH, J.: This is a foul libel, intended to make the plaintiff ridiculous for doing no more than as a sheriff's officer he was bound to do.

Homer vs. Engelhardt, 117 Mass. 539 (1875).

A Massachusetts statute provided that no action could be maintained in that state for the price of alcoholic liquor sold.

Homer, a Boston saloon keeper, was indebted to his brewer for a quantity of liquor. Engelhardt sued for the amount, but Homer successfully set up the statute in his defense. Engelhardt published a notice in a trade paper stating that Homer, to escape his just debt, had availed himself of the liquor law, and cautioning all other brewers and liquor dealers against trading with him.

Homer brought this action on the theory that the publication was libellous.

Held, that, as the publication imputed nothing which Homer was not legally entitled to do, it was not libellous.

ENDICOTT, J.: No action can be maintained in this commonwealth for the price of liquor sold in violation of law. St. 1869, c. 415, sec. 63. If such action is brought, it is the right of the defendant to set up in his answer this provision of the statute. It is a perfectly legitimate and legal defense, and stands as other defenses stand which the law interposes to defeat what, under other circumstances, would be a just demand. This publication does not charge that the plaintiff falsely, or even unsuccessfully, set up as a defense the existing prohibitory law. The gist of the charge is simply that he did set up such a defense. The plaintiff having the right to make this defense, it is not libelous to publish the statement that he has done so. The demurrer was rightly sustained in the court below.

DEFENCES—Justification.

Shepard vs. Merrill, 13 Johnson, 475. New York (1816).

The plaintiff's declaration alleged that the defendant had charged the plaintiff with stealing certain shingles belonging to the defendant. The defendant, by way of justification, pleaded that he had, "on leaving a house in Whitestown, demised to the plaintiff and one Joseph Tucker, left on the premises two thousand shingles, with direction to one John Mills to sell the same; that afterwards the plaintiff, solely or with the said Tucker, without any authority of the defendant, sold the shingles, and, on the defendant's inquiring for the shingles, denied that he knew anything about them or what had become of them, and refused to account for them; wherefore the defendant, on coming to the knowledge of the said facts, related the same, stating the circumstances, as he was warranted in doing."

Held, that the matters so pleaded were insufficient as a justification of the charge made by the defendant.

SPENCER, J.: The declaration alleges that the defendant below charged the plaintiff below with a theft; and the notice [used here in place of a plea] states that the plaintiff below sold the defendant's shingles without authority, and that he afterwards denied that he knew anything about the shingles. This by no means imputes a larceny, but rather the telling a lie. It is not stated that the shingles were taken privately or feloniously; and if they were not, a subsequent denial of the taking of them would not make the taking felonious.

Privilege.

Bradley vs. Fisher, 13 Wall. 335, Supreme Court of the United States (1871).

Fisher was one of the justices of the Supreme Court of the District of Columbia. In 1867 he presided at the trial of John H. Suratt, who was charged with the murder of Abraham Lincoln. One of the counsel for Suratt was Bradley, an eminent member of the District bar. On one day during the pendency of the trial, after the adjournment of the court, Bradley sought Judge Fisher in his chambers and in the course of the interview behaved in a manner which the judge considered insolent and derogatory to the judicial dignity. After the close of the trial, some weeks later, the judge entered upon the record of the court an order disbarring Mr. Bradley, the entry reciting that, on the occasion mentioned:

"As the presiding justice was descending from the bench, Joseph H. Bradley, Esq., accosted him in a rude and insulting manner, charging the judge with having offered him (Mr. Bradley) a series of insults from the bench from the commencement of the trial. The judge disclaimed any intention of passing any insult whatever, and assured Mr. Bradley that he entertained for him no other feelings than those of respect. Mr. Bradley, so far from accepting this explanation or disclaimer, threatened the judge with personal chastisement. No court can administer justice or live if its judges are to be threatened with personal chastisement on all occasions whenever the irascibility of counsel may be excited by imaginary insult. The offence of Mr. Bradley is one which even his years will not palliate. It cannot be overlooked or go unpunished."

Bradley brought this action to recover damages for his disbarment, alleging that the defendant had been guilty of "willful, malicious, oppressive and tyrannical acts and conduct" in taking that action. At the trial, the plaintiff offered to prove that the statements made in the entry were untrue, and that he had not acted or spoken as the judge had recorded. The proof on this point was excluded, the court ruling that the defendant had jurisdiction and discretion to make the order, and that he could

not be held responsible in this private action for so doing; and the jury was instructed to render a verdict for the defendant. The judgment entered upon this verdict was affirmed by the Supreme Court of the United States, which court held that judges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.

FIELD, J.: The plea, as will be seen from our statement of it, not only sets up that the order of which the plaintiff complains was an order of the Criminal Court, but that it was made by the defendant in the lawful exercise and performance of his authority and duty as its presiding justice. In other words, it sets up that the order for the entry of which the suit is brought, was a judicial act, done by the defendant as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act, and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.

The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as CHANCELLOR KENT observes, "a deep root in the common law."

Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. This was adjudged in the case of Floyd and Barker, reported by Coke, in 1608, where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself, and it was observed that if they were required to answer otherwise, it would "tend to the scandal and subversion of all justice, and those who are the most sincere, would not be free from continual calumniations." * * *

In the case of Randall vs. Brigham, 7 Wall. 523, decided by this court, at the December Term of 1868, we had occasion to consider at some length the liability of judicial officers to answer in a civil action for their judicial acts. In that case the plaintiff had been removed by the defendant, who was one of the justices of the Superior Court of Massachusetts, from the bar of that State, and the action was brought for such removal, which was alleged in the declaration to have been made without lawful authority, and wantonly, arbitrarily and oppressively. In considering the questions presented the court observed that it was a general principle, applicable to all judicial officers, that they were not liable to a civil action for any judicial act done by them within their jurisdiction; that with reference to judges of limited and inferior authority it had been held that they were protected only when they acted within their jurisdiction; that if this were the case with respect to them, no such limitation existed with respect to judges of superior or general authority; that they were not liable in civil actions for their judicial acts, even when such acts were in excess of their jurisdiction, "unless, perhaps, when the acts in excess of jurisdiction are done maliciously or corruptly." The qualifying words were inserted upon the suggestion that the previous language laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that if the language remained unqualified it would require an explanation of some apparently conflicting adjudications found in the reports. They were not intended as an expression of opinion that in the cases supposed such liability would exist, but to avoid the expression of a contrary doctrine.

In the present case we have looked into the authorities and are clear, from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction

over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons.

Harlow vs. Carroll, 6 App. D. C. 128. District of Columbia (1895).

Mrs. Harlow filed a bill in equity against Carroll to recover possession of a shawl which she claimed to have deposited with him as security for the payment of some indebtedness. In his answer, Carroll introduced a statement imputing disreputable conduct and "unlawful practices" to the complainant, and alleging that she was "of no veracity or reputation." The complainant's character and reputation had no bearing upon her right to recover the shawl, and the reflection upon her was purely gratuitous and wholly irrelevant to the merits of the cause. Mrs. Harlow therefore sued Carroll and his counsel, who had signed the answer, for libel. The contention on the part of the defence was that the statement was absolutely privileged for the reason that it was made in the course of judicial proceedings. *Held,* however, that both defendants were liable, and that the privilege of party and counsel does not extend to defamatory matter incorporated into the pleadings which is irrelevant to the subject of the litigation.

MORRIS, J.: The extent of the immunity to which counsel and witnesses are entitled for words spoken or testimony given by them in the course of judicial proceedings is a question upon which it must be admitted that the authorities are by no means uniform. If the rule of the English courts upon the subject is to be regarded as settled by the comparatively recent case of Munster vs. Lamb, Law Rep. 11 Q. B. Div. 588, decided in 1883, in favor of the absolute privilege and immunity

both of counsel and witnesses in such cases, and which appears to be in antagonism to the great majority of the preceding decisions in England and to the great authority both of Coke and Blackstone, we must suppose that the public policy and the professional conditions in that country now demand a greater latitude than would seem to have been justified by previous adjudications.

In that case it was said: "For the purpose of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously; that is to say, not with the object of doing something useful towards the defense of his client; I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor, arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behavior may have been. * * * The rule is founded upon public policy. With regard to counsel, the question of malice, *bona fides* and relevancy cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against counsel must be stopped at once. No action of any kind, no criminal prosecution can be maintained against a defendant, when it is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry."

This is certainly broad doctrine, strongly stated; and coming from a court so eminent as England's chief appellate tribunal, it is entitled to our most profound respect. But we are wholly unable to subscribe to its logic or to accept its conclusion. The theory is startling that an advocate may violate the criminal law with impunity if he does it in a court of justice and in the course of a pending suit in which he is concerned. And it is almost equally startling to think that a court of justice should be the only place, or perhaps it would be more correct to say, one of the few places, where a man's good name and reputation may be assailed with impunity by the way of oral slander or written libel. * * *

We think the just rule in regard to this question of privilege was stated by the Supreme Court of Massachusetts, by CHIEF JUSTICE SHAW, in the case of Hoar vs. Wood, 3 Metc. 193, when it said: "This privilege must be restrained by some limit; and we consider that limit to be this: that a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness or third person, which have no relation to the cause or subject-matter of the inquiry."

CHANCELLOR WALWORTH, in the case of Hastings vs. Lusk, 22 Wend. 410, stated it as follows: "Upon a full consideration of all the authorities on the subject, I think that the privilege of counsel in advocating the causes of their clients, and of parties who are conducting their own causes, belongs to the same class, where they have confined themselves to what was relevant and pertinent to the question before the court."

We do not know that any good purpose would be subserved by a review of the adjudications upon this subject. Such a review to be satisfactory should be exhaustive; and we think it has been sufficiently done in various cases that have been cited. Such a review may be found in the case of Maulsby vs. Reifsnider, 69 Md. 143, in which, in a very elaborate opinion by MR. JUSTICE ROBINSON, the subject was fully examined, and the leading cases, both English and American, very fully analyzed; and the rule laid down by CHIEF JUSTICE SHAW, in the case of Hoar vs. Wood, was accepted as the true and correct doctrine upon the subject. Said the Court of Appeals of Maryland in the case of Maulsby vs. Reifsnider:

"In view of this unbroken line of decisions, both in England and in this country, we cannot accept the absolute and unqualified privilege laid down in Munster vs. Lamb. It is in the teeth of the decisions in Brook vs. Montague, Croke Jac. 50, and Hodgson vs. Scarlett, 1 Barn. & Ald. 332, and Mackay vs. Ford, 5 Hurl. & Norman, 790; and is not sustained by Revis vs. Smith, 18 Com. Bench, 125; Henderson vs. Broomhead, 4 Hurl. & Norman, 567; Dawkins vs. Lord Rokeby, Law Rep. 7, English and Irish App. 752, or Seaman vs. Netherclift, Law Rep. 2, Com. Pleas. Div. 53. We cannot agree with Brett, M. R., that, in a suit against counsel for slander, the only inquiry is whether the words were spoken in a judicial proceeding, and if so, the case must be stopped. We quite agree, however, with BRAMWELL, J. A., in Seaman vs. Netherclift, that 'relevant' and 'pertinent' are not the best words that could be used. These words have in a measure a technical meaning, and we all know the difficulty in determining in some cases what is relevant or pertinent. With LORD CHANCELLOR CAIRNS, we prefer the words, 'having reference,' or 'made with reference;' or, in the language of SHAW, C. J., 'having relation to the cause or subject-matter.' And if counsel in the trial of a cause maliciously slanders a party, or witness, or other person in regard to a matter that had no reference or relation to, or connection with, the case before the court, he is and ought to be answerable in an action by the party injured. This qualification of his privilege in no manner impairs the freedom of discussion so necessary to the proper administration of the law, nor does it subject counsel to actions for slander, except in cases in which upon reason and sound public policy he ought to be held answerable. We cannot agree that for the abuse of his privilege he is amenable only to the authority of the court. Mere punishment by the court is no recompense to one who has thus been maliciously and wantonly slandered."

Vogel, Executor, vs. Gruaz, 110 U. S. 311. Supreme Court of the United States (1884).

The action was brought by Gruaz against Dr. Bircher for slanderous words. The defendant died after a verdict against him in the court below, and his executor obtained a writ of error, upon which the judgment against him was reversed.

Mr. Cook was the State's Attorney for that county in Illinois in which the parties lived, and it was his official duty to institute criminal proceedings against all persons committing offences in that county. Dr. Bircher called upon Cook, with whom he had had no previous acquaintance, and charged Gruaz with the larceny of some money belonging to Bircher. Upon the facts as stated by Bircher the State's Attorney considered that a prosecution was warranted, and he directed the doctor to go before the grand jury and testify to those facts. Bircher accordingly appeared before the grand jury; but whether an indictment against Gruaz was returned does not appear. The State's Attorney, while believing that the case stated by Bircher constituted a crime, advised the doctor that it would be difficult of proof and that he had better not try to secure an indictment.

Held, that the communication made by Bircher to Cook was absolutely privileged, as one made to a public officer in relation to a matter within the scope of the officer's duty.

BLATCHFORD, J.: We are of opinion that what was said by Bircher to Mr. Cook was an absolutely privileged communication. It was said to Mr. Cook while he was State's Attorney, or prosecutor of crimes, for the county, and while he was acting in that capacity. * * * He [Bircher] laid the matter before Mr. Cook, and charged Gruaz with having stolen the money, and was asked how, and stated how, and inquired of Mr. Cook if there was any law in Illinois by which a man could be prosecuted for that. The grand jury was then in session, and Mr. Cook advised Bircher that he had a good case, and directed him to the grand jury room, and Bircher went before the grand jury. If all this had taken place between Bircher and an attorney consulted by him who did not hold the public position which Mr. Cook did, clearly, the communication would have been privileged, and not to be disclosed against the objection of Bircher. Under the circumstances shown, Mr. Cook was the professional adviser of Bircher, consulted by him, on a statement of his case, to learn his opinion as to whether there was ground in fact and in law for making an attempt to procure an indictment against Gruaz. The fact that Mr. Cook held the position of public prosecutor, and was not to be paid by Bircher for information or advice, did not destroy the relation which the law established between them. It made that relation more sacred, on the ground of public policy.

The avenue to the grand jury should always be free and unobstructed. Bircher might have gone directly before it, without consulting Mr. Cook, but if he chose to consult him, instead of private counsel, there was great propriety in his doing so. * * * By the statute of Illinois in force at the time of this occurrence, it was made the duty of each State's Attorney to "commence and prosecute" all criminal actions, suits, indictments and

prosecutions in any court of record in his county in which the people of the state or county might be concerned. Under this provision, it was the privilege of any person who knew of facts tending to show the commission of a crime, to lay those facts before the public officer whose duty it was to commence a prosecution for the crime. Public policy will protect all such communications, absolutely, and without reference to the motive or intent of the informer or the question of probable cause; the ground being that greater mischief will probably result from requiring or permitting them to be disclosed than from wholly rejecting them.

Spalding vs. Vilas, 161 U. S. 483. Supreme Court of the United States (1896).

Vilas was the Postmaster General of the United States. Spalding was an attorney whose practice consisted largely in the prosecution of claims against the United States. He had been instrumental in procuring legislation for the adjustment of postmasters' salaries, and had obtained contracts from several thousand postmasters, by which contracts he was authorized to prosecute their claims for increased allowances under the said legislation, and by which he had been promised many valuable fees. Vilas allowed many of these claims, but, declining to recognize Spalding's merits in the premises, and acting upon his construction of certain statutory provisions, he sent the drafts for the payment of the claims directly to the respective claimants. At the same time, he sent to each claimant a letter stating that "no attorney's services were necessary in the presentation of the claim before the department, and the Congress desired all the proceeds to reach the person really entitled thereto"; and stating also that, by section 3477 of the Revised Statutes, "any transfer of this claim, or power of attorney for receiving payment of this warrant is null and void." It was alleged by Spalding that this method of payment was adopted, and this advice given, "to further harass the plaintiff, and to injure him in his good name and in his business, without any good reason therefor, and with malicious intent, and that the defendant "undertook to induce the clients of the plaintiff to repudiate the contracts they had made . . . using his official character for such purpose, thus placing the plaintiff before the country as a common swindler." It was further alleged that several of the statements made in the Postmaster General's

letter were untrue in fact, and that the whole communication was without the scope of his official authority and inspired by personal malice against the plaintiff. Damages to the amount of $25,000 were claimed on account of fees lost by reason of the defendant's action, and additional damages on account of the injury to the plaintiff's reputation.

The court held that the Postmaster General was correct in his understanding and statement of the statutory provisions on the subject, and that "if not strictly his duty, it was his right to call the attention of claimants to the provisions of the Act of 1883." It was further observed, that the statement that no attorney's services were necessary, "if not strictly accurate, was, at most, only an expression of the opinion of the Postmaster General in the course of his official duties," and that he was warranted in suggesting to the claimants that all assignments of such claims and all powers of attorney to receive the proceeds were void under another statute. The court then considered the allegation that the defendant had in this transaction been actuated by malicious motives; and this fact, assuming it to be a fact, was declared to be immaterial. The opinion cites several cases holding that judges are not liable for the erroneous and malicious exercise of judicial authority, and pronounces the case of an executive officer to be within the same principle. The judgment, in accordance with this reasoning, was for the defendant.

HARLAN, J.: The act of the head of one of the departments of the government in calling the attention of any person having business with such department to a statute relating in any way to such business, cannot be made the foundation of a cause of action against such officers.

If, as we hold to be the case, the circular issued by the Postmaster General to claimants under the acts of Congress in question was not unauthorized by law, nor beyond the scope of his official duties, can this action be maintained because of the allegation that what the officer did was done maliciously?

This precise question has not, so far as we are aware, been the subject of judicial determination. But there are adjudged cases, in which principles have been announced that have some bearing upon the present inquiry. * * *

In Dawkins vs. Lord Paulet, L. R. 5 Q. B. 94, 114, which was an action for libel brought by an officer of the army against his superior officer to recover damages on account of a report made by the latter in relation to

certain letters of the former, the defendant claimed that what he did was done in the course of and as an act of military duty. The replication stated that the libel was written by the defendant of actual malice, without any reasonable, probable or justifiable cause, and not *bona fide* or in the *bona fide* discharge of the defendant's duty as such superior officer. The case was heard on demurrer to the replication, and it was held by all the justices (COCKBURN, C. J., only dissenting) that the action would not lie. The case was first considered in the light of the pleadings and the admissions of the demurrer. MELLOR, J., said: "I apprehend that the motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be. I think that the law regards the doing of the duty and not the motives from or under which it is done. In short, it appears to me, that the proposition resulting from the admitted statements in this record amounts to this: Does an action lie against a man for maliciously doing his duty? I am of opinion that it does not; and, therefore, upon the pleadings as they stand, we might give judgment for the defendant." But, according to the report of that case, the Attorney General did not rest the defence on the effect of the admissions in the pleadings, but contended broadly that no action would lie against an officer of the army charged with duties such as those stated on the record, for the discharge of them. He likened the case to that of the judges of courts of law, to grand jurymen, petty jurymen and to witnesses, against whom no action lies for what they do in the course of their duty, however maliciously they may do it, and claimed immunity for the defendant for the acts done in the course of his duty on the highest grounds of policy and convenience. No judge, no jury, nor witness, he said, "could discharge his duty freely if not protected by a positive rule of law from being harassed by actions in respect of the mode in which he did the duty imposed upon him, and he contended that the position of the defendant manifestly required the like protection to be extended to him and to all officers in the same position." "There is," MELLOR, J., said, "little doubt that the reasons which justify the immunity in the one case do in great measure extend to the other."

An instructive case upon the general subject of the immunity of public officers from actions for damages on account of what they may have done in the course of their official duties is Dawkins vs. Lord Rokeby, L. R. 8 Q. B. 255, 262, the judgment in which was affirmed by the House of Lords. L. R. 7 H. L. 744, 754. The defendant, a general in the English army, was called before a court of inquiry, legally assembled to inquire into the conduct of the plaintiff, also an officer in the army. He made statements in evidence, and, after the close of the evidence, handed in a written paper (not called for by the court, but having reference to the subject of the inquiry) as to the conduct of that officer. An action was brought in respect of those statements, which were alleged to be both untrue and malicious. That case came before the Queen's Bench, in the Exchequer Chamber, upon a bill of exceptions allowed by Mr. JUSTICE BLACKBURN, who had instructed the jury as matter of law that the action would not lie, if the verbal and written statements complained of were made by the defendant, being a military officer, in the course of a mili-

tary inquiry, in relation to the conduct of the plaintiff, he being also a military officer, and with reference to the subject of that inquiry; and this even though the plaintiff should prove that the defendant had acted *mala fide*, and with actual malice, and without any reasonable or probable cause, and with the knowledge that the statements made and handed in by him were false. The Court, all the judges concurring, sustained the correctness of this ruling, and held that the statements were privileged. "The authorities," it was said, "are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law." LORD CHANCELLOR CAIRNS, in the House of Lords, said: "Adopting the expressions of the learned judges with regard to what I take to be the settled law as to the protection of witnesses in judicial proceedings, I certainly am of opinion that upon all principles, and certainly upon all considerations of convenience and public policy, the same protection which is extended to a witness in a judicial proceeding who has been examined on oath ought to be extended, and must be extended, to a military man who is called before a court of inquiry of this kind for the purpose of testifying there upon a matter of military discipline connected with the army. It is not denied that the statements which he made, both those which were made *viva voce* and those which were made in writing, were relative to the inquiry."

We are of opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial functions, apply to a large extent to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts. As in the case of a judicial officer, we recognize a distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority, and action having more or less connection with the general matters committed by law to his control or supervision. Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the head of a department, it is clear—and the present case requires nothing more to be determined—that he cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an Act of Congress, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action; for, personal motives cannot be imputed to duly authorized official conduct. In exercising the functions of his office, the head of an executive department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he

were subjected to any such restraint. He may have legal authority to act, but he may have such large discretion in the premises that it will not always be his absolute duty to exercise the authority with which he is invested. But if he acts, having authority, his conduct cannot be made the foundation of a suit against him personally for damages, even if the circumstances show that he is not disagreeably impressed by the fact that his action injuriously affects the claims of particular individuals. In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty, as postmaster general. The motive that impelled him to do that of which the plaintiff complains is, therefore, wholly immaterial. If we were to hold that the demurrer admitted, for the purposes of the trial, that the defendant acted maliciously, that could not change the law.

De Arnaud vs. Ainsworth, 24 App. D. C. 167 (1904).

De Arnaud, who called himself by the title of colonel and stated that he was "a Russian officer of great military talent," had been employed in connection with the military operations of the United States Army in 1861 and 1862. He alleged that at that time he had been commissioned as a captain in the regular army and that his employment was in the capacity of a military expert—a term which seems never to have been precisely defined by him or precisely understood by any military authority. The services which he performed were much like those of an ordinary spy, and some persons, including Colonel Ainsworth, declared that he had been simply engaged in the secret service of the army. In 1895 De Arnaud applied to the Secretary of War for a medal of honor, to be granted him on account of his distinguished services as a military expert, which services were represented as highly meritorious and very valuable. Colonel Ainsworth was then an officer in the army and assigned to duty as the chief of the Record and Pension Division of the War Department. In the usual routine of departmental business De Arnaud's application was referred to that division, and by the regulations of the department it became the duty of Ainsworth to make a report which should embody the facts material to the applicant's claim and should also embody a recommendation with respect to the allowance or disallowance of the medal. Ainsworth made to the Secretary of War a report which was strongly, and somewhat bitterly, adverse to De

Arnaud's claim, the effect being that De Arnaud had never been an officer, that the services which he claimed to have performed were grossly and fraudulently exaggerated and in part fictitious, and that the claim had no other foundation than "an insane imagination or a desire to perpetrate an impudent and barefaced fraud." Upon this report De Arnaud was refused the medal.

About the same time De Arnaud endeavored to secure legislation by Congress providing for the payment to him of a considerable sum of money on account of his services in the army. In considering this measure, the Senate Committee on Military Affairs obtained, in what way did not appear, a copy of the Ainsworth report on the claim for a medal; and the committee, in reporting adversely upon De Arnaud's bill, incorporated this report into its own. The report of the committee was afterwards published, in accordance with the law applicable to Congressional proceedings, as a public document. In 1902, one Hill called upon Ainsworth in his office at the War Department, professedly seeking information about De Arnaud. To Hill Ainsworth said that he had written a report upon De Arnaud's career and merits, which Hill could find at the Capitol. Hill said that he did not care enough about the matter to go thither for the report. Ainsworth then took from a book-case in his office a bound volume containing the report of 1895, and this he showed to Hill, saying it would prove De Arnaud to be a great fraud.

De Arnaud now sued Ainsworth for libel, in one count complaining of the defendant's first publication of the report by sending it to the Secretary of War, and in another count alleging a publication of the same report by exhibiting the printed copy to Hill. At the trial the plaintiff offered to show express malice on the part of the defendant by proving that the latter had introduced into his report matters prejudicial to the plaintiff and had omitted to mention much that was favorable. The court, however, held that the report was absolutely privileged, excluded all the evidence offered by the plaintiff and directed a verdict for the defendant. On appeal this action was approved; and it was held:

1. That Ainsworth, in reporting to the Secretary of War, was absolutely privileged, so that neither the truth of what he said nor his motives, whether malicious or otherwise, could be inquired into; and,

2. That the report, being published as a public document, was such a paper that "every person desiring it was entitled to receive and inspect it; and all persons giving circulation to the report thus published are protected by the law."

The opinion cites and relies upon Spalding vs. Vilas, 161 U. S. 483, and the English cases therein cited, and also Chatterton vs. Secretary of State, 2 Q. B. 189, an English case of later date than 161 U. S.

Bromage vs. Prosser, 4 B. & C. 247. King's Bench (1825).

Bromage and Snead were bankers at Monmouth. Prosser, who lived at Brecon, had been on business at Crickhowell where he had paid a debt to one Brown in notes of the plaintiff's bank. Brown said at the time that there was a run on the bank and that, if there was anything in it, Prosser would have to take the notes back; and later in the day he required Prosser to take back the notes, but did not say that the bank had stopped payment. Prosser returned to Brecon and told one Thomas that Bromage and Snead had stopped. On the same day or the next, one Watkins met Prosser and to him said: "I hear that you say the bank of Bromage and Snead at Monmouth has stopped; is it true?" The defendant answered, "Yes, it is; I was told so. It was so reported at Crickhowell, and nobody would take their bills, and I have come to town in consequence of it, myself." The bank had not stopped payment.

In an action brought by the bankers for the speaking of these words, the facts being proved as they have been stated, the trial court told the jury that malice was the gist of the action; that it did not appear from the evidence that the defendant was actuated by any ill-will against the plaintiffs; that, if the words were not spoken maliciously the defendant was not answerable; and that, if they thought the words were not spoken maliciously, they ought to find for the defendant; otherwise, for the plaintiff. The verdict was for the defendant. This was set aside on

motion for new trial for the reason that the trial judge had improperly left to the jury the question of malice, the court holding that, unless the words were shown to have been spoken upon a privileged occasion, malice in the defendant was implied in the falsity of what he said.

BAYLEY, J.: If in an ordinary case of slander, not a case of privileged communication, want of malice is a question of fact for the consideration of the jury, the direction was right; but if in such a case the law *implies* such malice as is necessary to maintain the action, it is the duty of the judge to withdraw the question of malice from the consideration of the jury; and it appears to us that the direction in this case was wrong. * * *

Malice, in common acceptation, means ill-will against a person; but, in its legal sense, it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally, without just cause or excuse. If I maim cattle, without knowing whose they are; if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned of felony and willfully stand mute, I am said to do it of malice, because it is intentional, and without just cause or excuse: Russell on Crimes, 614, note 1. And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not; and, if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces?

And I apprehend the law recognizes the distinction between these two descriptions of malice, malice in fact, and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them falsely; it is not necessary to charge that they were spoken maliciously. This is so laid down in Styles, 392, and was adjudged upon error in Mercer vs. Sparks, Owen, 51; Noy, 35. The objection there was, that the words were not charged to have been spoken maliciously; but the court answered that the words themselves were malicious and slanderous, and therefore the judgment was affirmed.

But in actions for such slander as is *prima facie* excusable, on account of the cause of speaking or writing it, as in the case of servants' characters, confidential advice, or communications to those who ask it or have a right to expect it, malice in fact must be proved by the plaintiff. * * * Had it been noticed to the jury how the defendant came to speak the words, and had it been left to them as a previous question whether the defendant understood Watkins as asking for information as to his own guidance, and that the defendant spoke what he did to Watkins merely by way of honest advice to regulate his conduct, the question of malice in fact would have been proper as a second question to the jury, if their minds were in favor of the defendant on the first. But, as the previous

question I have mentioned was never put to the jury, but this was treated as an ordinary case of slander, we are of opinion that the question of malice ought not to have been left to the jury. * * * In granting a new trial, however, the court does not mean to say that it may not be proper to put the question of malice as a question of fact for the consideration of the jury. For, if the jury should think that, when Watkins asked his question, the defendant understood it as asked in order to obtain information to regulate his own conduct, it will range under the cases of privileged communications, and the question of malice in fact will then be a necessary part of the jury's inquiry. But it does not appear that it was left to the jury in this case to consider whether this was understood by the defendant as an application to him for advice; and, if not, the question of malice was improperly left to their consideration.

Fresh vs. Cutter, 73 Md. 87 (1890).

Jacob Cutter sued George H. Fresh for defamatory words alleged to have been spoken by the latter of and concerning the former. Cutter had at one time been an employee of Fresh, and after he ceased to occupy that relation, and had entered, or was about to enter, the service of one Allen, Fresh, of his own accord, and without solicitation or inquiry on the part of Allen, said to Allen: "He (meaning the plaintiff) stole as good as two hundred dollars from me, and I want the money." These are the alleged defamatory words. It was shown by the evidence that several persons had communicated information to Fresh which induced him to believe that Cutter had while in his employment stolen from him. It was also shown that, when he learned that his neighbor Allen had employed Cutter, he, Fresh, honestly believed that it was his duty to inform Allen of what he knew concerning Cutter; and that he told Allen these things voluntarily, and without being requested, honestly believing it was a duty he owed to his neighbor, and for the sole purpose of putting Allen upon his guard. He testified that he had not been actuated by malice or ill-will, and that he had never had any bad feeling against Cutter. There was some evidence that the words complained of had been spoken by Fresh to a person named Click, though the latter was unable to state whether the language used by the defendant was "took" or "stole." *Held,* that the statement to Allen was a privileged communication.

McSHERRY, J.: This brief outline of the facts is sufficient to indicate that the principal question which we are called upon to decide on this

appeal is whether the statement made by Fresh to Allen, under the circumstances named, was a privileged communication or not. If privileged, all the authorities agree in holding that it is not absolutely or unqualifiedly, but only conditionally, so. If falsely and maliciously made, it would be actionable. Malice is the foundation of the action, and in ordinary cases is implied from the slander; but there may be justification from the occasion; and, when this appears, an exception to the general rule arises, and the words must be proved to be malicious as well as false. Beeler vs. Jackson, 64 Md. 593, 2 Atl. 916. This justification from the occasion arises, in the class of cases now being considered, when a communication is "made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, if made to a party having a corresponding interest or duty," although the communication "contained criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." Harrison vs. Bush, 5 El. & Bl. 344. It seems to be generally conceded, as falling within this principle, that where a master gives a character of a servant, unless the contrary be expressly proved, it will be presumed, that the character was given without malice, and the plaintiff, to support the action, must prove that the character was both falsely and maliciously given; and, although the statement as to the character should be untrue in fact, the master will be held justified by the occasion, unless it can be shown that in making the statement he was actuated by a malicious feeling, and knowingly stated what was untrue and injurious. Starkie, Sland & L. 253. If, under the conditions just named, the statement was made in response to an inquiry, it would undoubtedly be privileged. Weatherston vs. Hawkins, 1 Term R. 110; Child vs. Affleck, 9 Barn. & C. 403. But in the case at bar it is conceded that the information was given by the appellant to Allen voluntarily, and not in response to any inquiry whatever, and this is supposed to take the case out of the privilege. It is not perceived why this circumstance should make any difference if the party has acted honestly, fairly, and without malice, though, when the information has been voluntarily given, this fact, it has been said, may in some cases have a tendency to disclose the motive of the purlisher in making the publication. Townsh. Sland. & L. sec. 241. Without reviewing the decided cases, it may be said that the weight of authority is to the effect that the mere fact of the communication being voluntarily made does not necessarily exclude it as a non-privileged communication, for a publication warranted by an occasion apparently beneficial and honest is not actionable, in the absence of express malice. Starkie, Sland. & L. 253. Or, as is stated in Odgers, Sland & L. 202: "If it were found that I wrote systematically to every one to whom the plaintiff applied for work, the jury would probably give damages against me. On the other hand, if B. was an intimate friend or a relation of mine, and there was no other evidence of malice except that I volunteered the information, the occasion would still be privileged." Rogers vs. Clifton, 3 Bos. & P. 587; Pattison vs. Jones, 8 Barn. & C. 585. It is a question for the court whether the statement, if made in good faith, and without malice, is thus privileged. But the plaintiff has the right,

notwithstanding the privileged character of the communication, to go to the jury if there be evidence tending to show actual malice, as when the words unreasonably impute crime, or the occasion of their utterance is such as to indicate, by its unnecessary publicity, or otherwise, a purpose wrongfully to defame the plaintiff. Dale vs. Harris, 109 Mass. 196; Brow vs. Hathaway, 13 Allen, 239; Somerville vs. Hawkins, 10 C. B. 583; Gassett vs. Gilbert, 6 Gray, 94. Or malice may be established by showing that the publication contained matter not relevant to the occasion. Townsh. Sland. & L. sec. 245. Expressions in excess of what the occasion warrants do not *per se* take away the privilege, but such excess may be evidence of malice. Ruckley vs. Kiernan, 7 Ir. C. L. 75; Hotchkiss vs. Porter, 30 Conn. 414. It follows from these principles that if the communication made to Allen was made in good faith, without malice, in the honest belief of its truth, and under the conviction that it was a duty which Fresh owed to Allen to make it, the words complained of would not be actionable because privileged, though spoken voluntarily. It is equally clear that if the words spoken were known to be false and were maliciously spoken, or were voluntarily spoken to one to whom Fresh owed no duty, in the sense heretofore mentioned, the words would be actionable, because not within the privilege.

Brice vs. Curtis, 38 App. D. C. 304.

Miss Brice called upon Dr. Curtis for medical advice; he prescribed for her and instructed her to return if not relieved. Becoming no better, she again called upon the physician, in company with her sister, and was subjected to medical examination, whereupon the defendant expressed his professional opinion that she was in a pregnant condition. She disputed the correctness of the diagnosis; an X-ray examination was suggested, but to this the plaintiff would not accede. The sister accompanied the plaintiff at the latter's request, and the publication of the diagnosis to the sister was the grievance sued for. The defense was that of privilege and want of sufficient publication to support the cause of action. A verdict for the defendant was directed and upon the exception to that instruction the appeal was taken. *Held*, that the verdict was properly directed, the statement being made upon a privileged occasion, and the presence of a third party being by procurement of the plaintiff.

ROBB, J.: The burden is of course upon the defendant to establish an occasion of privilege, to prove that the circumstances were such as to warrant the statement of facts honestly believed to be true. When this burden is sustained, or when, upon the admitted facts, it is plain that a duty rested upon the party making the statements, the burden shifts and the plaintiff must then show actual malice. * * * By malice, as used in this connection, we mean a lack of good faith, a wrong motive. Unless, therefore, the evidence would warrant the jury in finding a lack of good faith, there can be no recovery.

Admittedly, the relation which the defendant sustained to the plaintiff upon the occasion in question was of a most confidential character. She appeared at his office with her sister and sought his advice as to her

condition and treatment for the same. Each party was interested, and it was the defendant's duty honestly to express an opinion as to plaintiff's condition. The occasion was therefore clearly privileged. The only remaining question is whether there was anything in the plaintiff's evidence which would warrant a finding that the defendant was not acting in good faith, or was actuated by malice. * * *

In the instant case the statements of the defendant were made in the natural course of his business, and in response to the express and implied request of the plaintiff that she be informed of the nature of her ailment. The sister, the only third party present, was there by the procurement of the plaintiff and the defendant was in no way responsible for her presence. She accompanied the plaintiff upon each of the two occasions, and, by request of the plaintiff, was present when the defendant made the examination. The defendant, therefore, had a right to assume that he could speak freely and frankly. Certain it is that, unless he took advantage of the occasion for the purpose of vilifying the plaintiff, and of making statements so far beyond the demands of the occasion as to indicate malice or lack of good faith, the presence of this witness, in the circumstances disclosed, in no way affects the situation.

There is no evidence whatever tending to show malice: Upon the occasion of the first visit the defendant expressed no opinion as to the condition of the plaintiff. Upon the occasion of the second visit he expressed no opinion until he had made an examination. While we must assume that the defendant was mistaken in his diagnosis, there is no evidence that the conditions upon which he based that diagnosis did not reasonably admit of the conclusion reached. There was no evidence that the defendant bore plaintiff any ill-will. On the contrary, the fact that she consulted him indicates that their relations were friendly, or, at least, not unfriendly. Having, after an examination, expressed his opinion as to plaintiff's condition, it was but natural that the defendant should have sought to sustain that opinion. The conversation following the first expression of opinion was inspired by the plaintiff and her sister, and there is nothing in that conversation indicating a lack of good faith on the part of the defendant. His suggestion that the plaintiff submit to an X-ray examination clearly indicates his conviction that his diagnosis was correct.

Byam vs. Collins, 111 N. Y. 143 (1888).

Mrs. Collins, before her marriage, had been on terms of intimate friendship with Miss Dora McNaughton, both of them residing in the village of Caledonia. During this period Miss McNaughton had repeatedly requested the other young woman, "if she knew anything about any young man she went with, or in fact any young man in the place, to tell her, because her father did not go out a great deal and had no means of knowing, and people would not be apt to tell him," and because also the

future Mrs. Collins had a brother and would therefore be more likely than the other lady to hear what was said about young men. How much information Miss McNaughton gained in accordance with this request does not appear; but after her friend was married a coolness arose between the two and their intimacy ceased. Some months later Mr. Byam became acquainted with Miss McNaughton and, in course of time, manifested a disposition to marry her. There were indications, also, that the young lady was inclined to accept Byam. Mrs. Collins had heard reports which were seriously to the discredit of Mr. Byam, and she felt that it would be a kindly act to warn her former friend against too close a relationship with that gentleman. She was also solicited by "mutual friends" to interfere in the matter and break off the relations which seemed to exist between Byam and Dora. Accordingly, Mrs. Collins wrote a letter to Miss McNaughton making some defamatory statements concerning Byam. This letter, naturally, came into the hands of the person libelled, and he brought this action therefor.

The defence was that the facts which have been stated constituted such a privileged relationship between Miss McNaughton and Mrs. Collins as justified the latter in communicating to the former whatever the informant in good faith believed and supposed to be material to the welfare of her friend.

Held, that the facts did not render the defendant's letter a privileged statement and that she was liable for any false and defamatory matter contained therein.

EARL, J.: The general rule is that in the case of a libellous publication the law implies malice, and infers some damage. What are called "privileged communications" are exceptions to this rule. Such communications are divided into several classes, with only one of which we are concerned in this case, and that is generally formulated thus: "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminating matter which, without this privilege, would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation:" Harrison vs. Bush, 5 El. & Bl. 344. One may not go about in the community, and, acting upon mere rumors, proclaim to everybody the supposed frailties or bad character of his neighbor, however firmly he may believe such rumors, and be convinced that he owes a social duty to give them cur

rency, that the victim of them may be avoided; and ordinarily one cannot with safety, however free he may be from actual malice, as a volunteer, pour the poison of such rumors into the ears of one who might be affected if the rumors were true. * * *

Mrs. Collins testified that, when she wrote the letter, she thought just as much of Dora as if she had belonged to her family; that she had heard the defamatory rumors, and believed them, and, therefore, did not wish her to marry the plaintiff. It must be observed that the request of Dora to Mrs. Collins for information about young men was not made when she was contemplating marriage to any young man, and that the request was not for information about any particular young man, or about any young man in whom she had an interest, but it was for information about the young men generally with whom she associated. Nor, literally construing the language, did Dora wish for information as to the gossip and rumors afloat as to the young men. What she asked for was such facts as Mrs. Collins knew, and that for her opinion about young men, or her estimation of them. But if we assume that the request was for information as to all rumors about young men which came to the knoweldge of Mrs. Collins, the case of the defendant is not improved. At that time the plaintiff was not within Dora's contemplation, as she did not know him until long after. The request was not for information as to any young man who might pay her attention with a view to matrimony, it was for information about all the young men in her circle. Mrs. Collins was not related to her, and was under no duty to give the information, and Dora had no sufficient interest to receive the information. She could properly tell what she knew about young men, but could not defame them, even upon request, by telling what she did not know, but what she believed upon mere rumors and hearsay to be true. The mere fact that she was requested or even urged to give the information did not make the defamatory communication privileged. * * *

But there is no proof that this letter was written to Dora in pursuance of any request made by her four years before its date. On the contrary, it is clear that Dora would not at the time have gone to Mrs. Collins for any information as to plaintiff if she had desired any, and that she did not wish for the information from her; and that this was known to Mrs. Collins the language of the letter clearly shows. * * * Mrs. Collins then appears as a mere volunteer, writing the letter to break up relations which she feared might lead to the marriage of the plaintiff to Dora. If she had been the mother of Dora or a close relative, or if she had been asked by Dora for information as to the plaintiff's character and standing, she could with propriety have given any information she possessed affecting his character, provided she acted in good faith, and without malice. But a mere volunteer, having no duty to perform, no interest to subserve, interferes with the relations between two such people at her peril. The rules of law should not be so administered as to encourage such intermeddling which may not only blast reputation but possibly wreck lives. In such a case the duty not to defame is more pressing than the duty to communicate were defamatory rumors not known to be true.

Some loose expressions may doubtless be found in textbooks and judicial opinions supporting the contention of the defendant that this letter was in some sense a privileged communication. But, after a very careful research, I believe there is absolutely no reported decision to that effect. The case which is as favorable to the defendant as any, if not more favorable than any other, is that of Todd vs. Hawkins, 8 C. & P. 88. In that case a widow being about to marry the plaintiff, the defendant, who had married her daughter, wrote her a letter containing imputations on the plaintiff's character and advising a diligent and extensive inquiry into his character; and it was held that the letter was written on a justifiable occasion, and that the defendant was justified in writing it, provided the jury were satisfied that in writing it he acted *bona fide*, although the imputations contained in the letter were false, or based upon the most erroneous information; and if he used expressions however harsh, hasty or untrue, yet *bona fide* and believing them to be true, he was justified in so doing. The letter was held privileged solely upon the ground of the near relationship existing between the widow and the defendant, her son-in-law, which justified his voluntary interference. But the judge expressly stated that, if the widow and the defendant had been strangers to each other there would have been a mere question of damages.

A case nearer in point is that of Count Joannes vs. Bennett, 5 Allen, 169; 81 Am. Dec. 738. There it was held that a letter to a woman containing libellous matter concerning her suitor cannot be justified on the ground that the writer was her friend and former pastor, and that the letter was written at the request of her parents, who assented to all its contents. The decision was put upon the ground that in writing the letter, the defendant had no interest of his own to serve or protect; that he was not in the exercise of any legal or moral duty; that the proposed marriage did not even involve any sacrifice of his feelings or injury to his affections, and did not in any way interfere with or disturb his personal or social relations; that the person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred, and that he had no peculiar interest in her. Some years before, the same learned Court decided the case of Krebs vs. Oliver, 12 Gray, 239, wherein it was held that statements that a man had been imprisoned for larceny, made to the family of a woman whom he is about to marry, by one who is no relation of either, and not in answer to an inquiry, are not privileged communications. In the opinion it is said: "A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them. The duty of refraining from the utterance of slanderous words without knowing or ascertaining their truth far outweighs any claim of mere friendship."

Norfolk & Washington Steamboat Co. vs. Davis, 12 App. D. C. 306.

Davis was master and pilot of a vessel belonging to the defendant company, but was about to be dismissed. Thereupon a friend of his named Murray, who was not in any way a party in interest, addressed a letter to Callahan, General Superintendent for the defendant, making a plea for the retention of Davis in his position. The reply was a detailed assertion of alleged incompetence and inefficiency of Davis as a master and pilot, the letter being signed by Callahan as "General Superintendent." The right of Callahan to hire and discharge employees and act generally for the company was satisfactorily established. Davis complained to the president of the company about the damage which the letter had done to his chances of securing other employment, but the president declined to take any action, whereupon suit was brought.

A question was raised as to whether the act of Callahan in writing the letter was within the scope of his authority as general superintendent, but the principal ground of defence set up was that the communication was privileged.

These points were decided as follows:

ALVEY, C. J.: Before proceeding to consider the specific errors assigned, it would seem to be proper to state a few of the general well-settled principles of law, applicable to the facts of the case. The onus of proof, of course, was upon the plaintiff to establish the fact of the publication of the letter containing the libel declared on, and that the letter was written and published under such circumstances as to render the defendant liable therefor. We do not understand it to be seriously argued that the letter is not libellous, and if the circumstances of its publication be such as to make it the act of the defendant, by its authorized agent, that the plaintiff would not be entitled to recover, unless, indeed, the occasion of the writing and publishing of the letter afforded to the defendant or its agent a qualified privilege for the communication. But it is contended on the part of the defendant 1st, that the letter to Murray was not the act, or the authorized act, of the defendant, but was the mere personal act of Callahan, the general agent and superintendent of the defendant; and, 2nd, that if the letter was written under such circumstances as to make it the act of the defendant, there were facts and circumstances that afforded a qualified privilege that would exempt the defendant from liability.

In regard to the first of these contentions, that of absence of authority in Callahan to bind the defendant by the letter to Murray, we must bear

in mind the fact that Callahan appears to have been invested with general and almost supreme authority in the management of the operative affairs of the line of steamers. He had full and complete authority in respect to the employment and discharge of all the employees engaged about the steamers; and it was in the exercise of this authority that he discharged the plaintiff from his position as commander of the steamer "Washington." The letter of Murray to Callahan had reference to the authority of the latter as general superintendent, for by that letter Callahan was requested to reinstate the plaintiff in his former position. But instead of simply replying to the letter that he deemed it to be to the interest of his company to put some other person in the place of the plaintiff, Callahan thought proper to go into many circumstances and occurrences that he must have known would disparage and throw discredit upon the plaintiff as a commander of a steamer. This he was not asked to do by the letter from Murray. The letter from Callahan to Murray professes upon its face to have been written by virtue of his position of general superintendent of the defendant; and the subsequent refusal of those in authority to interfere when the matter was brought to their attention was a fact, not without weight, to be considered by the jury, in determining the question whether the letter was written and published within the scope of the authority delegated to Callahan as general agent and manager, or by subsequent approval of the defendant company. The question was very fully and fairly submitted to the jury, and they have found adversely to the contention of the defendant.

Seeing, then, according to the finding of the jury, that the defendant is liable for whatever is actionable in the letter written by its superintendent, Callahan, the next question is, do the circumstances of the case show that the letter complained of was written upon an occasion that entitled the defendant to the benefit and protection of a privileged communication? And while all disputed facts were required to be submitted to the jury, the question of privilege was one of law for the court to decide. It is argued that because Murray had taken a special interest in his friend, the plaintiff, and had recommended him for appointment to position of captain of the Virginia oyster fleet, he therefore had a special interest in the matter of the discharge of the plaintiff from the service of the defendant company, and, consequently, there was a duty, at least of a moral nature, on the part of the superintendent of the defendant, to make the communication to Murray. But to this proposition we cannot accede. We know of no well-recognized authority that carries the principle of privileged communication to such an extent. There was no duty either legal or moral that required the making of the communication to Murray, and there was no such interest in Murray as would have entitled him to request such communication even if he had been disposed to make it; but he made no request for the communication of the matter complained of by the plaintiff. The reason assigned by Callahan for the extended communication is stated in the letter to Murray. He says: "I have written you at greater length than I anticipated, but it was necessary in order to show you *and other friends* a few of the reasons only which necessitated the removal of Captain Davis." * * *

The question whether a letter or other communication, addressed by one party to another, is within the privilege of communication, depends not only upon the occasion that calls forth the publication, but also upon the character of the communication itself. A party may have a privilege and a protection in making a communication in regard to the qualities or character of another person, but if he abuse that occasion, and goes much beyond what is required or proper in his statements relating to that other person, the occasion will not protect him. A communication is only privileged within the rule when made in good faith, in answer to one having an interest in the information sought; and it will be privileged, even if volunteered, when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable social duty, or at least proper that he should give the information, as a just and reasonable means to guard the person receiving the information against an act or dealing that might be prejudicial to him. This appears to be substantially the result of the authorities, or of the best considered cases; though each case depends more or less upon its own special circumstances, and especially as those circumstances may reflect upon the relation of the parties and the question of *bona fides* of the party making the communication. * * *

Negley vs. Farrow, 60 Md. 158 (1883).

The defendants published in a newspaper which they owned the charge that the plaintiff, a member of the State Senate, had voted in that body so as to further the interests of a corrupt politician belonging to the opposite party, and that the plaintiff had received as compensation for his vote a valuable contract for the sale of building materials to the State. The senator brought this action for libel. The defendants, being unable to prove the truth of their charges, contended that the publication was privileged on the grounds, first, that the conduct of the plaintiff as a public officer was subject to free and irresponsible discussion, and, second, that the defendants, as publishers of a newspaper, were entitled to especial immunity in their treatment of public characters.

The plaintiff was allowed to recover, the court holding that the right to discuss public affairs does not afford license to defame public men, and that the publisher of a newspaper has in his respect no peculiar privilege.

ROBINSON, J.: It is well settled that any publication which tends to injure one's reputation, and expose him to hatred or contempt, if made without lawful excuse, is libellous. It can hardly be necessary to say that such charges as these, against the official conduct of the plaintiff, and the imputation of the base and sordid motives by which such conduct was governed, were calculated to injure his reputation and expose him to the contempt of all honorable men. * * *

No one denies the right of the defendants to discuss and criticise boldly and fearlessly the official conduct of the plaintiff. It is a right which, in every free country belongs to the citizen, and the exercise of it, within lawful and proper limits, affords some protection at least against

official abuse and corruption. But there is a broad distinction between fair and legitimate discussion in regard to the conduct of a public man, and the imputation of corrupt motives, by which that conduct may be supposed to be governed.. * * * The fact that one is the proprietor of a newspaper, entitles him to no privilege in this respect, not possessed by the community in general. The law recognizes no duty, imposed on him, arising from his relation to the public, to defame and libel the character of anyone, and if he does, it is no answer to say, he did so in good faith, and without malice, honestly believing it to be true. Malice in one sense may be said to be an essential element in an action for libel, but not malice in the ordinary sense of hatred or ill-will against the person of whom the defamatory words are spoken. If the publication be in itself libellous, the law in all such cases implies malice; in other words, it says, You have no right to libel another, whatever may have been the motives or intention.

Coffin vs. Brown, 94 Md. 190 (1901).

Mr. Lowndes, a Republican, being the Governor of Maryland and nominated by his party for re-election to that office, had appointed Brown as a supervisor of elections. In November of 1899, a few days before the election, Coffin, who had been a leading Republican, wrote to Murray Vandiver, the chairman of the Democratic State Central Committee, a letter setting out the reasons why the writer should not vote for Lowndes, but should support the Democratic candidate for the governorship. One of these reasons was the appointment of Brown, of whom the letter asserted: "This man Brown was a justice of the peace under Democratic rule, and at that time kept a speak-easy, where he sold whiskey, and then, as justice, fined the men for disorderly conduct. He helped stuff the ballot box at the Republican primaries in Vansville District two years ago, and has no moral character whatever. * * * A man that every one who knows him believes can be induced to perpetrate any crime in politics that will pay him."

This letter was published by the Democratic Committee and given extensive circulation in the State. Brown sued Coffin for the libel embodied in the letter. The defendant pleaded the general issue and several special pleas in justification. Among these was one in which it was sought to justify the charge, that Brown could "be induced to perpetrate any crime in politics that would pay him," by alleging that, in November, 1900, about a year after Coffin's letter was written, Brown had, while acting as a judge of election, purchased a vote. The principal defence, however, was that the letter was a privileged communication by reason of the fact that it related to public affairs and was in the nature of comment upon the official action of a public officer.

Held, that the charge of criminal propensity was not justified by proof of a crime committed by him a year after the charge was made; and that the letter was not a privileged communication.

Boyd, J. [As to the charge of buying a vote]: The only question we need consider . . . is whether the defendant is entitled to justify by

alleging that the plaintiff had done those acts at the election held in November, 1900, which was the year after the publication of the alleged libel. As was said in Lewis vs. Daily News Company, 81 Md. 473, "every publication injurious to the character is, in law, false and malicious until the presumption of falsehood is met by plea of the truth, or the presumption of falsehood is removed by showing a justifiable occasion or motive." That being so, it is difficult to see how an act done a year afterwards can be said to meet the presumption that the publication was false. In 18 Encyc. of Law, 1009, a great many cases are cited to sustain the statement in the text that, "to constitute a justification, the precise charge must be justified, and it will not be sufficient to offer truth of another charge, though of the same general nature, and though distinct only as to the subject-matter or the time and place." It cannot be claimed that the statement made in the letter of the defendant which is referred to in those pleas was based on what occurred a year afterwards. So far as the acts set out are concerned, the defendant was not justified in what he said of the plaintiff in November, 1899, and no one could have been so gifted with prophecy as to have believed in 1899 that the plaintiff could be induced to perpetrate any crime in politics that would pay him, by reason of what he afterwards did in 1900. The defendant, in a case of this character, is exempted from liability when he proves that what he published of the plaintiff was true; but, unless he does, or the publication is protected by privilege, it is not justified, even if the defendant in good faith believed the charges to be true and otherwise acted without malice. * * *

It is contended that it was the duty of the appellant to make known such information as he had concerning the appellee, who had been appointed a supervisor of elections. * * * It is difficult to understand how it can be contended from what appears in the record that this letter was written by the appellant for the purpose of giving to Mr. Vandiver information concerning the appellee, in discharge of a duty he, as an elector, owed the public. It is apparent that it was aimed at Governor Lowndes, and the object was to affect his candidacy. The statements about the appellee were given as reasons for the appellant not supporting Governor Lowndes, and manifestly were not intended to enable Mr. Vandiver to take any steps toward the removal of the appellee, who was appointed by the Governor, who alone was authorized to remove him for good cause shown, upon written charges and after notice and hearing, Code, Art. 33, Sec. 3. If such charges had been made in good faith by the appellant against the appellee, to the Governor, in an effort to have him removed, and the appellee was complaining of that, the appellant would occupy a very different position from that which he has placed himself in.

There may be a justification from the occasion in some classes of cases, and then the words must be proved to be malicious as well as false, to entitle the plaintiff to recover. In Fresh vs. Cutter, 73 Md. 92, this Court quoted with approval from Harrison vs. Bush, 5 El. & Bl. 344, that such justification arises when a communication is "made *bona fide* upon any subject-matter in which the party communicating has an *interest*, or in reference to which he has a *duty*, if made to a party having a corresponding interest or duty, . . . and this though the duty be not a legal one,

but only a moral or social duty of imperfect legal obligation." But that cannot be extended to an occasion such as this letter presents. Surely the appellant owed no such duty to Mr. Vandiver, or the political party he represented, or to the public, as authorized him to speak thus of the appellee, under the protection of that rule. Nor can it be said that he had such an interest as is there referred to. To so extend the rule would place a premium on abuse, which is unfortunately already too freely used during political campaigns for the good of the country.

The authorities are not altogether uniform as to how far a public officer, who is a candidate before the people for re-election can be criticised, without subjecting the writer to a suit for damages. In this State it has been said that, while the official conduct of a public officer may be discussed and criticised, within lawful and proper limits, ... if one goes out of his way to asperse the personal character of a public man, and to ascribe to him base and corrupt motives, he must do so at his peril; and must either prove the truth of what he says or answer in damages to the party injured." Negley vs. Farrow, 60 Md. 177. In 18 Ency. of Law, 1041, it is stated that, "the prevailing rule is that charges imputing a criminal offense or moral delinquency to a public officer cannot if false be privileged, though made in good faith, and this though the charge relates to an act of the officer in the discharge of his official duties;" and many cases are cited. * * * When public officers, for political or other purposes, select for important positions those who are utterly incompetent or of bad character, such officers deserve to be exposed; but when direct and specific charges are made against their appointees, in order to injure the candidates who appointed them, the publisher of them ought to be prepared to establish them by proof. Our Declaration of Rights declares "that any citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that privilege.*"

Weeks vs. News Publishing Co., 117 Md. 126 (1912).

In the Baltimore News, a daily paper published in Baltimore City, there appeared this article:

"There is a good old adage that you can judge a man by the company he keeps, and this ought to hold good in politics. A man may not be responsible if a black sheep here and there becomes his adherent; but when the 'line up' is as general in character as in the present primary contest, it must be accepted as defining a candidate's status. I believe I am correct in putting down the following list as Mr. Preston's friends: 'Judge Bill' Garland, 'Hon.' Harry Wolf, and 'Tom' Weeks, counsel for 'Willie' Downs, 'Sonny' Mahon, 'The' Kelly, 'Bob' Padgett, 'Hon.' George Konig, all the 'Gas' Councilmen, including those indicted by the Grand Jury.

"We can safely add to this 'company' an almost unanimous vote of the disreputable saloons, the gambling hells, the bawdy houses, and others of that ilk who, from the nature of their trade, require 'protection' from those higher up."

Thomas C. Weeks, an attorney of the Baltimore Bar, was the person designated in this article as Tom Weeks, and he sued the News Company on account of the publication, which he conceived to be libellous. The declaration alleged that the plaintiff was "an attorney at law in good standing and repute in the practice of his profession," and that he enjoyed in the community "a reputation as a moral, law-abiding and respectable citizen . . . of professional integrity and honesty in the practice of law." It was then, by way of *colloquium*, averred that the defendants, on a certain date, "falsely and maliciously printed and published and caused to be printed and published, of and concerning the plaintiff individually and in his professional capacity as attorney at law," the article above set out. Afterwards, as an *innuendo*, it was alleged that the defendants, by the said publication, meant to signify that "the said plaintiff, speaking of him individually and as an attorney at law, as a 'black sheep,' was a man of criminal character and unfit to practice his profession as an attorney at law; as one belonging to the criminal classes, and as of the company of keepers of disreputable saloons, gambling hells, bawdy houses, and others of that ilk, who from the nature of their trade require protection from those higher up; and intending thereby to bring the plaintiff into public scorn, contumely and disrepute among his neighbors, clients and acquaintances."

On demurrer to this declaration it was held:

That a publication having the sense and effect which the *innuendo* imputed to this article would be libellous and actionable *per se;* but

That the article sued upon did not in itself bear such meaning and import as was ascribed to it; and, as a matter of pleading, the *colloquium* and the *innuendo* were ineffectual to elicit from the publication the libellous quality alleged.

THOMAS, J.: * * * There can be no doubt that if the article complained of contained a false charge that the plaintiff "was a man of criminal character and unfit to practice his profession," or that he "belonged to the criminal classes," such as "keepers of disreputable saloons, gambling hells and bawdy houses," it would be libellous. Indeed, it may be stated as the settled law of this State, that, in order to constitute a libel, it is not necessary that the publication should charge one with the commission of a crime or with having a contagious disease, but any words which impute to him conduct or qualities tending to injure his character, or to degrade him, or which expose him to contempt, ridicule or public hatred are *per se* libellous. In the case of Hagan vs. Hendry, 18 Md. 191, CHIEF JUDGE BOWIE quotes the statement in 1 American Leading Cases, 116 (Ed. of 1857), that "any publication injurious to the social character of another, and not shown to be true or to have been justifiably made, is actionable as a false and malicious libel." In the case of Snyder vs. Fulton, 34 Md. 135, CHIEF JUDGE BARTOL adopts the view of CHANCELLOR KENT, 1 Kent's Comm. 620, that, "Expressions which tend to render a man ridiculous, or degrade him in the esteem and opinion of the world, would be libellous, if printed, though they would not be actionable if spoken. So, if they tend to injure his reputation and expose him to public hatred, contempt or ridicule." And in the more recent case of

Goldsborough vs. Orem & Johnson, 103 Md. 681, this Court, speaking through JUDGE BURKE, said: "A false and malicious printed or written publication which imputes conduct or qualities tending to disparage or degrade the plaintiff, or expose him to contempt, ridicule or public hatred, or prejudice his private character or credit, is libellous *per se*." * * *

But the real question presented by the demurrer in this case is, not whether it is actionable to publish of an attorney at law a statement that he is a man of criminal character and unfit to practice his profession, or that he belongs to the criminal classes, but whether the article referred to is susceptible of the meaning ascribed to it in the declaration.

The demurrer admits that the article was published by the defendant, and that it is false and malicious; but it does not admit that the words published, in themselves, or as explained by the *innuendo*, are actionable, nor does it admit that they are, when read by themselves, or in connection with the inducement and *colloquium*, capable of the meaning ascribed to them in the *innuendo*. If it be conceded that the article, as interpreted by the *innuendo*, is actionable, the question whether the *innuendo* is good, that is to say, whether it is fairly warranted by the article, when read with the inducement and *colloquium*, still remains as a matter of law for the Court. It is the office of the *innuendo* to explain the words of the libel and to give to them their true meaning. It can not, however, introduce new matter, or enlarge or add to the sense of the words declared on, or properly impute to them a meaning not justified by the publication, either when taken alone or in connection with the inducement and *colloquium*. * * * In Avirett vs. State (76 Md. 510), JUDGE MCSHERRY, after referring to the statement of LORD TENTERDEN, C. J., in Harvey vs. French, 1 Cr. & M. 11, that "It is quite clear from all the modern authorities that a Court must read words in the sense in which ordinary persons, or in which we ourselves out of Court, reading the paragraph, would understand them," said, "They cannot be enlarged or extended by an *innuendo*, no matter how strongly an *innuendo* may impute an offensive meaning to them. Whether an *innuendo* is good in law, that is to say, whether it is fairly warranted by the language set forth in connection with the inducement and *colloquium* is obviously matter of law. As the *innuendo* can not enlarge, extend or add to the sense or effect of the words set forth, or properly impute an offense which the publication, either in itself or in connection with the inducement and *colloquium*, does not charge or fairly imply, it follows that the *innuendo*, which is simply equivalent to *scilicet* or *id est*, and whose whole office is to explain the effect of the words used, can not, by enlarging the meaning of the words, make an indictment good which, without that *innuendo*, would be bad. If, therefore, the words set forth in the first count of the indictment, either in themselves or in connection with the inducement and the *colloquium* do not involve a charge . . . the *innuendoes* can not make them do so; and if the *innuendoes* attempt to do this by assigning as the correct and actual meaning of the words a construction not fairly inferrable from them, or not fairly deducible from the words as explained by the *colloquia* and the extraneous facts averred, the demurrer to that count should be sustained."

Applying these rules to the case at bar, we find that the inducement alleges merely that the plaintiff was an attorney-at-law in good standing, etc., while the averment of the *colloquium* is that the article was published of and concerning the plaintiff "individually" and as an attorney-at-law. The publication does not expressly charge that the plaintiff "was a man of criminal character and unfit to practice his profession as an attorney-at-law," or state that he "belonged to the criminal classes" such as "keepers of disreputable saloons, gambling hells and bawdy houses, and others of that ilk." On the contrary, the apparent intention of the writer was to place the plaintiff in another and different class, for after naming a number of persons, including the plaintiff, as the friends of Mr. Preston, he then, in another paragraph, states that, in addition to the persons so named, Mr. Preston had as his supporters an almost unanimous vote of the disreputable saloons, etc. * * * The statement that Mr. Preston was supported by the persons named in the first paragraph of the article, that he would also receive the votes of those described in the second paragraph, does not imply that those mentioned in the first paragraph belonged to the same class as those referred to in the second. Reading the article as a whole, and allowing the words employed their natural significance, we fail to find anything in the publication itself, or in the inducement and *colloquium* to justify the meaning ascribed to it in the declaration. The *innuendo* being therefore bad, in that it attempts to give to the article a meaning not fairly deducible from the publication, inducement and *colloquium*, the demurrer was properly sustained.

The only charge that the article could be properly said to contain is that the plaintiff and the others named were "black sheep." But we are not required in this case to determine whether it would be libellous to publish of an attorney-at-law, engaged in the practice of his profession, a false statement in writing that he was a "black sheep." The declaration charges that the article meant that the plaintiff was a man of criminal character, etc.; and it is obvious that the term "black sheep" would not be given such a meaning in the absence of some allegation to show that it was so intended and understood. * * *

In cases of this kind, it was formerly necessary to insert in the declaration, by way of inducement, a prefatory averment of the meaning of the words, and then by *innuendo* to allege that they were used to convey that meaning. This was changed by section 61 of the Common Law Procedure Act, 1852, which made it unnecessary to have an introductory averment of the meaning of the words, and provided that the meaning might be stated in the *innuendo*. Hemmings vs. Gasson, 27 Law Journal, Q. B. (1858), 252; Bullen and Leakes' Precedents of Pleadings, *supra* (p. 305). It is accordingly stated in Odgers on Libel and Slander, star page 23, that "It is libellous to call a man a 'black sheep' or a 'black-leg.' But there should be an averment that these words mean a person guilty of habitually cheating and defrauding others." Following the former practice, PARKE, B., in the case of McGregor vs. Gregory, 11 M. & W. 287, on page 295, said: "We think that the averment of the meaning of the term 'black sheep' is properly introduced by way of inducement;" and this is the rule that still prevails in this State where it is claimed that the words

were used to convey a particular meaning other than that naturally and ordinarily ascribed to them. Peterson vs. Sentman, 37 Md. 140; Brinsfield vs. Howeth, 107 Md. 278; DeWitt vs. Scarlett, 113 Md. 47. In Poe's Pl. & Pr., sec. 173 (3rd Ed.), Mr. Poe repeats the statement of the court in Peterson vs. Sentman, *supra*, that: "Words will not be understood to impute a crime if, in their milder sense, they have another and harmless meaning, unless the connection in which they are used and applied would give them that effect." * * * Where, then, the words are ambiguous, or have an actionable and a non-actionable meaning, the actionable character sought to be given to them in the *innuendo*, that is to say, the sense in which the plaintiff avers that they were used, must be supported by such an averment and *colloquium* as will warrant the defamatory meaning ascribed to them in the *innuendo*. 1 Poe's P. & P., *supra;* Dorsey vs. Whipps, 8 Gill. 462; Brinsfield vs. Howeth, *supra;* DeWitt vs. Scarlett, *supra*.

As there is nothing in the article itself, or in the declaration, to justify the meaning ascribed to the publication in the *innuendo*, there was no error in the ruling of the court below on the demurrer, and the judgment appealed from must be affirmed.

Golderman vs. Stearns et ux, 7 Gray, 181. Massachusetts (1856).

Shortly after his marriage, Golderman discovered that he had contracted a venereal disease from his wife, whereupon he sent her away, terminating their relations.

Mrs. Stearns sometime later said of the plaintiff, "Golderman has the venereal disease. It is an old affair, and being married has brought it on again. He is the guilty one. He has given it to his wife."

Golderman brought this action for slander.

Held, he could not maintain it, the words, so far as they were actionable *per se,* being proved to be true, and no special damage being shown to have resulted from that part of the charge which was not actionable *per se.*

METCALF, J.: The charge against the plaintiff of his having the venereal disease is held to be actionable for the same reason that a charge of his having the leprosy or the plague would be; not because the charge imputes any legal or moral offense, but solely because it tends to exclude him from society as a person having a disgusting and contagious disease. Hence it is that to charge one with having had the disease is not actionable; such a charge not tending to exclude him from society as a person with whom it is unsafe to associate. Carslake vs. Mapledoram, 2 Term Rep. 473.

The jury having found that the plaintiff, when the charge against him was made, had the venereal disease, there remains no ground on which this action can be maintained; for the truth of the charge is a justification. Doubtless such a charge as the plaintiff complains of may be accompanied with words that necessarily impute adultery or fornication, either of which is an offence punishable by the laws of this commonwealth. In such a case the charge would be actionable. But, in the present case, the words which were added to the charge of the plaintiff's having the disease did not impute any punishable offence. They only assert that the plaintiff, while a widower, was diseased, and, after his marriage to his present wife communicated the disease to her. The allegation that he was "the guilty one" means that the disease was communicated by him to her, and not by her to him. It does not import that he contracted the disease guiltily; that is, by committing adultery or fornication. Nor does the plaintiff's declaration aver that any punishable offense is imputed to him by the words spoken.

McBee vs. Fulton, 47 Md. 403 (1878).

Fulton and his co-defendants published in a newspaper conducted by them a news article which was headed "A Ruffian Caged," and which stated that William McBee, "a low character who habitually frequents the streets and always seeks to throw himself in the way of school girls, often insulting them with indecent remarks and actions," had been arrested, put on trial before a justice of the peace, and committed for the action of the grand jury. The article also indicated somewhat more precisely the character of McBee's alleged conduct, and it was said that he had "created the greatest annoyance to the young ladies by his persistent familiarities and vulgar insults," and that a number of young ladies had testified at the hearing to the misconduct of the accused.

McBee had, in fact, been arrested and tried as the newspaper reported; at the hearing there had been given evidence of such behavior on his part as was charged; and he had been held for the grand jury on the charge of indecent exposure. On this charge he was afterwards indicted by the grand jury, but was acquitted upon his trial in the Criminal Court.

McBee brought this action against the publishers for libel. The defendants pleaded not guilty and also that "the alleged defamatory writing set out in the declaration is true." The facts as here stated were proved, and the defendants gave evidence tending to show that McBee had in fact been guilty of such behavior as was imputed to him in the published article.

Held, that the publication was the subject of a qualified privilege, as the report of proceedings in a court of justice, provided that it appeared to the jury—as in this case it did—that the article was published in good faith and without malice, and that it was substantially correct, and that such comment as it contained was fair and warranted by the facts appearing in court; and that, upon the plea of justification, it was sufficient if the defendants furnished enough evidence to overcome in

the minds of the jury the presumption of innocence and the effect of opposing testimony, and that it was not necessary for them to satisfy the jury beyond a reasonable doubt, as in a criminal case, that the plaintiff was guilty of the crime charged.

MILLER, J.: Without going at large into the general question as to what communications the law protects from a civil action or criminal prosecution for libel, it is sufficient for the purposes of this case to say, that the adjudications both in England and in this country, have now clearly settled that there are:

1st. Some communications which on grounds of *public policy are absolutely privileged.*

2nd. Communications to which, on grounds of *public benefit a qualified privilege* is given, or those which are privileged by the occasion, if fair, *bona fide* and impartial, though defamatory of individuals and published to the world at large. Under this head are included newspaper and other reports of the proceedings of courts of justice. * * * By our Constitution justices of the peace are made part of the judiciary in whom the judicial power of the State is vested. * * * Here no authority (as in England) has been conferred upon them by statute to conduct their examinations *in private.* * * * When thus publicly acting in the discharge of judicial duties we see no reason why these proceedings thus publicly conducted before magistrates, whether the accused permits them to be *ex parte* or makes his defense, or whether they result in his discharge or committal, should not be deemed the proceedings of a public court of justice and reports of them entitled to this qualified privilege, under the law of libel.

The next question arises upon the plea of justification. In civil suits for libel, it has always been held that the truth of the defamatory matter may be pleaded in justification, and if established by proof is a complete bar to the action. * * * Now, if an alleged libel charges a party with murder, and under such plea it is proved that he actually committed that crime, it is clearly no libel to call him a murderer. In such case the fairness and reasonableness of the comments, may well be treated as a question of law for the court. . . . And upon the assumption that the plaintiff was actually proved guilty of the acts which the alleged libel in this case charges against him, we find nothing by way of comment either in the term "Ruffian," in the heading of the article, or in any other part of it, which is not a fair and reasonable condemnation of such acts and the party who committed them.

SEDUCTION.

I. Of a Wife.

By the theory of the common law, a husband had a property in his wife's person, as well as a right to her society. Unlawful intercourse with the wife was therefore a trespass:

Tinker vs. Colwell, 193 U. S. 473.

The husband might for such injury also maintain an action upon the case, his grievance then being conceived as the loss of his wife's society consequent to the seduction.

Even in the absence of carnal intimacy between the defendant and the plaintiff's wife, the husband may maintain an action on the case for alienating the affections of his wife or for procuring her to absent herself from him. And it has been held that, where the defendant has, by statements and insinuations concerning the plaintiff, alienated the affections of the plaintiff's wife and caused her to leave him, it matters not that the statements made were true: "if the insinuations were true, and by means of those the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant":

Winsmore vs. Greenbank, Willes, 577.

Since the husband has an absolute right in the personal integrity of his wife, the liability of one who has unlawful relations with her does not depend upon his knowledge that she is married or upon other circumstances; the liability attaches, for instance, even though the defendant be himself rather seduced than seducer, and yields to the solicitations of the woman. Accordingly, in an action for criminal conversation, the defendant cannot defeat the action by showing the bad character and loose conduct of the plaintiff's wife before her improper relations with the defendant; but evidence of such facts is admissible to reduce the damages by showing that the husband is not so greatly injured as he would have been had his wife been of better character.

It was at one time held, by LORD KENYON, that proof of plaintiff's adultery would bar his action for criminal conversation with his wife: Wyndham vs. Wycombe, 4 Esp. 16; but it has since been settled that the plaintiff's gallantries and his neglect of his wife go only in reduction of the damages: Bromley vs. Wallace, 4 Esp. 237.

The rule on the subject of damages in cases of this character is that stated by BULLER, J., in

Dulberly vs. Gunning, *infra*, p. 229.

II. Of a Daughter.

The father has not, at common law, any such property in the person of his daughter as in that of his wife. The seduction of a daughter is, therefore, not *per se* a wrong to the parent, but becomes so only as it bears upon the relation existing between them of master and servant. If, by reason of seduction by the defendant, the daughter is disabled to perform the service to which her father—or, if he be dead, the mother or some other person *in loco parentis*—is entitled, the defendant is liable for such injury to the parent in his relation as master. Although in some cases, the action of trespass has been allowed to lie for the seduction of a daughter, the wrong consists not in the carnal intercourse but in the injurious consequences of that intercourse.

I. **The Service.** No action lies, therefore, for the seduction of a daughter merely as such, but only where the daughter can be recognized as a servant of the parent. On which subject these distinctions are to be observed:

1. If the daughter be an infant and resident in her father's family, she is deemed without further proof to be his servant, the paternal right to require service being conclusive as to the relationship.

2. If she be an infant and resident elsewhere than in the father's house, the English and the American cases hold differently as to her status. In England, if she leaves her father's home without the intention to return as a member of the family,

she ceases to be his servant, whether or not she be under contract to serve elsewhere:

Dean vs. Peel, *infra*, p. 231;
Hedges vs. Tagg, *infra*, p. 231.

In the United States the father's right to require the service of his infant daughter is held to continue the relationship of master and servant until she reaches her majority, and to be unaffected by the girl's absence from home or even by her being under contract for service elsewhere; therefore, if an infant daughter be seduced, her father may maintain an action therefor, notwithstanding that she is not resident in his family, and although she may be in the actual service of some one else:

Martin vs. Payne, *infra*, p. 231.

Even in England, in the case of an infant daughter in service away from home, so soon as her employment is terminated, her father's relation of master is instantly renewed; and he may recover against one who seduces her before she returns to his home:

Terry vs. Hutchinson, *infra*, p. 233.

3. If the daughter be of age when she is seduced, the right of her father to recover depends upon the actual relationship of master and servant. In the case of an adult daughter not resident in her father's family, there can be no recovery. If she is living with her father and performing service for him, she may be recognized as his servant so as to entitle him to damages on account of her seduction. In such a case it is not necessary to show a binding contract for service; and even where the daughter is married, but has left her husband and returned to her father's house, the father may recover as master against one who seduces her.

The relationship of master and servant being established—whether from the daughter's mere minority or from her rendition of service after full age—it is not necessary that the service actually rendered be at all substantial, but any very slight discharge of domestic duty will suffice. Thus, in Bennett vs.

Alcott, 2 T. R. 166, the daughter was thirty years of age and only occasionally did acts of service, but her father was allowed to recover against one who seduced her; and Buller, J., said:

"But in actions of this kind, the slightest evidence is sufficient; even milking cows. Here instances of actual service were proved, and therefore it is immaterial whether the daughter were of age or not. Neither is it material whether the servant be or be not hired for a year, or whether she has any wages; it being sufficient that she is a servant *de facto.*"

II. **The Damage.** Since the seduction of a daughter is not in itself a legal injury, but becomes a tort only by reason of its injurious consequences, the father or other person standing in parental relation cannot maintain an action for such a grievance unless it is followed by some actual damage, in the sense of material loss caused by the impairment of the daughter's ability to render service. And that loss must, in most jurisdictions, be some direct and natural result of the intercourse, it being generally requisite to show disability and expense occasioned by pregnancy, though in some American cases venereal infection or other sexual disorder has been recognized as a disability properly referable to seduction. If, therefore, pregnancy does not occur—or perhaps some disease directly caused by the carnal intercourse—the seducer is not made liable by showing other detrimental consequences from his act, such as impairment of the girl's reputation, or mental distress, though such distress should cause depression of health or even actual bodily malady: as where a young woman who had been seduced became ill by reason of the seducer's subsequent abandonment of her:

Boyle vs. Brandon, 13 M. & W. 738.

On this point, however, there is authority to the effect that any incapacity to render service caused by the seduction will be sufficient damage, though there be neither pregnancy nor venereal disease:

Abrahams vs. Kidney, 104 Mass. 222.
Bigelow on Torts, p. 272.

Though the character of the father as master is theoretically the ground upon which he is entitled to damages for the seduction of his daughter, and though there must be some colorable proof of such character, the relationship "is little more than a legal fiction used as a peg to hang a substantial award of damages on, as compensation, not to the master, but to the head of the family": Simpson vs. Grayson, 54 Ark. 404. Accordingly, once the fact of service is shown, together with damage legally deemed to result from the seduction, the jury are left very much at large to assess damages without reference to the value of the daughter's services or the actual pecuniary loss to the father, but according to their appraisement of the injury done to the father, the family and to the girl herself in the way of impaired reputation, mental distress and the other incidents of the affair.

III. **Defences.** The action may be defeated by showing that the plaintiff consented to, or connived at, the improper relations between his daughter and the defendant, or was so indifferent to their indecorums as in effect to license the seduction: thus where the practice of bundling, which is mentioned in Irving's Knickerbocker, was continued (so late as 1804), and a girl was thereby seduced, it was held that the father's culpable negligence in the matter disentitled him to recover, notwithstanding evidence that such familiarity was the custom of the country:

Seagar vs. Slingerland, 2 Caines Cases, 219.

Seduction of a Wife.

Duberley vs. Gunning, 4 Term Rep. 652. King's Bench (1791).

This was an action for criminal conversation, at the trial of which it appeared that there had been many indecent familiarities between the defendant and the plaintiff's wife in the presence of the plaintiff, who was, himself, at the same time engaged in like indecorum with another woman, and that the plaintiff kept a mistress. Notwithstanding these facts, the jury

found for the plaintiff and assessed his damages at £5000. The defendant moved for a new trial on the ground that the damages were excessive; but the court, while recognizing that the verdict was immoderate, refused to set it aside, for the reason that in such cases there could be no fixed rule for the assessment of damages. BULLER, J., dissented and was in favor of granting a new trial because of the circumstances which should have reduced the plaintiff's damages.*

BULLER, J.: The law on this subject is now clearly settled to be, that if the husband consent to his wife's adultery, it goes in bar of his action; if he be only guilty of negligence, or even loose and improper conduct, not amounting to a consent, it only goes in reduction of damages. * * * In many of them [cases] it is expressly said that the court may grant a new trial for excessive damages. I agree that there must be facts for the court to proceed upon, in ascertaining the excess of damages and granting a new trial on that account; but there are many such facts in this case. Besides the scandalous and indecent liberties which the husband permitted the defendant to take with his wife in his own presence, while he was engaged in a similar conduct with another woman at the time, there is another fact in this case, which is the proof of the plaintiff's having kept another woman at the time, whom he was in the constant habit of visiting.

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*Apparently it was on the trial of this case that LORD KENYON made the ruling which is ascribed to him in the following passage:

"In another case in which the wife of the plaintiff, as he knew when he married her, was a wanton, it actually came out on cross-examination that she not only painted her face, but that she exposed her person most indecently.

"LORD KENYON: 'I see no ground here for cutting down the damages. Such things as are imputed to the plaintiff's wife are not uncommon among ladies of quality, and no mercy should be shown to the defendant [General Gunning], who is an abominable, hoary, degraded creature' ": Campbell, Lives of the Chief Justices, vol. 4, p. 73.

"Such speeches," observes LORD CAMPBELL, "gained him great popularity with the vulgar, but made the judicious grieve. LORD KENYON, about the same time, expressed with some violence of language his reprehension of gambling, which was then quite prevalent in society, and he declared that, if any persons were convicted before him of that offence, 'whatever may be their rank or station in the country, though they may be the first ladies in the land, they shall certainly exhibit themselves in the pillory.' This declaration of the Chief Justice provoked the Earl of Carlisle to a defence of the ladies who were addicted to gaming, and the Earl deplored the sad consequences due to the fact that the seats of justice were occupied by 'legal monks, utterly ignorant of human nature and of the ways of men, who were governed by their own paltry prejudices, and thought they must be virtuous in proportion as they were coarse and ill-mannered' ": Campbell, Lives, v. 4, p. 74.

Seduction of a Daughter—The Service.

Dean vs. Peel, 5 East, 45. King's Bench (1804).

The plaintiff's daughter, E. D., was nineteen years of age, and was seduced whilst living in the house of one Taylor, who kept a public house, and who had married her sister. Mrs. Taylor had died, whereupon E. D. acted as housekeeper for Taylor and had charge of the bar. She had no contract for wages and did not in fact receive any, and she was at liberty to leave when she chose. Finding herself with child, E. D. returned to the house of her father, who paid the expense of her lying-in. After leaving the public house, she applied to Taylor for wages, but he refused to pay her any. She testified that, but for her misfortune, she had not intended to return to her father.

Held, that the father could not recover, the girl being at the time of her seduction in the actual service of another person.

Hedges vs. Tagg, L. R. 7 Exch. 283. Exchequer (1872).

The plaintiff's daughter was in service as a governess, and was seduced by the defendant while on a three days' visit, with her employer's permission, to the plaintiff, her mother. During her visit she gave some assistance in household duties. At the time of her confinement she was in the service of another employer, and afterward returned home to her mother. In an action for her seduction, brought by her mother, *held,* that there was no evidence of service at the time of the seduction, and therefore the action was not maintainable; and that the action must fail on the ground, also, that the confinement did not take place whilst the daughter was in the plaintiff's service.

Martin vs. Payne, 9 Johnson, 387. New York (1812).

Action by a father for the seduction of his daughter, who was at the time of the seduction nineteen years of age and living with her uncle. She worked for the uncle when she chose, at a wage of a shilling a day, and also earned money by other work. She spent her money for her own needs as she saw fit. There

was no agreement with the uncle that she should remain with him for any specific time, and she had resided with him for about a year on the terms indicated and with the consent of her father. Immediately after the seduction, she returned to her father's house, who supported her thereafter and paid the expense of her lying-in. She testified that she had, before the seduction, no expectation of returning to her father.

Held, that the plaintiff could recover.*

SPENCER, J.: The case of Dean vs. Peel is against the action. It was there held that the daughter being in the service of another and having no *animus revertendi*, the relationship of master and servant did not exist. In the present case, the father had made no contract hiring out his daughter, and the relationship of master and servant did exist, from the legal control he had over her services; and, although she had no intention of returning, that did not terminate the relation, because her volition could not affect his rights. That is the only case which has ever denied the right of the father to maintain an action for debauching his daughter whilst under age; and I consider it a departure from all former decisions on this subject. It has frequently been decided that, where the daughter was more than twenty-one years of age, there must exist some kind of service; but the slightest acts have been held to constitute the relation of master and servant in such a case. In Bennett vs. Allcottt [2 T. R. 166] the daughter was thirty years of age; and BULLER, J., held that even milking cows was sufficient. But, where the daughter was over twenty-one, and in the service of another, as in Postlethwaite vs. Parkes [3 Burrow, 1778], the action is not maintainable. In Johnson vs. McAdam, cited by TOPPING in Dean vs. Peel, WILSON, J., said that, where the daughter was under age, he believed the action was maintainable, though she was not part of the father's family when she was seduced; but, when she was of age and no part of the father's family, he thought the action not maintainable. In Fores vs. Wilson [Peake, 55], which was an action for assaulting the maid of the plaintiff and debauching her, *per quod*, etc., LORD KENYON held that there must subsist some relation of master and servant; yet a very

*"The rule laid down in Dean vs. Peel has never, in this State, been deemed a sound one. The case itself, and the principle of Tagg vs. Hedges, L. R. 7 Exch. 283, have been expressly overruled in the higher courts of this State on three several occasions. See Mulvehall vs. Millward, 11 N. Y. 343, where the cases are cited. The principle is there settled that, where there is an actual or constructive service, that is, where the child actually performs service, or where the parent is legally entitled to, and has the right to require, such service if he thinks fit, the cause of action exists. In that case, the minor daughter went to live with the defendant, was seduced by him while in his service, and remained absent until after her confinement, and there was no proof that the father expended anything on account of her sickness; it was held that the father could maintain the action. This decision is in the highest court of this State and is conclusive upon us. I hold it also to be sound law and based upon better sense than the English cases cited"; Hunt, C., in Gray vs. Durland, 51 N. Y. 424 (1873).

slight relation was sufficient, as it had been determined that, when daughters of the highest and most opulent families have been seduced, the parent may maintain an action on the supposed relation of master and servant, though every one must know that such a child cannot be treated as a menial servant. Put the case of a gentleman's daughter at a boarding school, debauched and gotten with child; on what principle can the father maintain the action but on the supposed relation of master and servant, arising from the power possessed by the father to require menial services? for in such a case there is no actual existing service constituting the relation of master and servant. Would it not be monstrous to contend that for such an injury the law afforded no redress?

Terry vs. Hutchinson, 3 Q. B. 599 (1868).

The plaintiff resided at Canterbury. His daughter, aged nineteen, was in the employ of a draper at Deal. She attended a concert with a ticket which had been given her by the defendant, a military officer. For this she was discharged by the draper, and started by train to return to her father at Canterbury. The defendant took the same train, induced the young woman to get into a first-class carriage with him, and then and there, as she said, seduced her. She was afterwards delivered of a child, of which she swore the defendant was the father.

Held, that the plaintiff could recover, since the girl's service at Deal had been terminated and she became thereupon again in the service of her father.

MELLOR, J.: I doubt whether any case has been decided which goes quite as far as the present; but the cases cited in the argument of Dean vs. Peel, and the comment made upon them by the court, show that, although the daughter be not actually resident with the parent at the time of the seduction, yet, if she be a minor and there is the *animus revertendi*, that is sufficient to maintain the implied relation of master and servant. Here the daughter was in the course of returning, having already begun her journey home, when the intercourse took place, and that is therefore sufficient.

TRESPASS.

A trespass, in the largest sense of the word, is any wrongful act (*transgressio*); as in "Forgive us our trespasses." As the term is limited in the law of torts, a trespass is

An unlawful act, committed with force, and directly causing damage to the person or the absolute rights of another or to property of another in his possession.

Trespass is, essentially, the unlawful disturbance by force of another person's possession.

The elements essential to constitute a trespass are (1) An act done with force, (2) Direct damage, and (3) Possession by the party injured of the property damaged.

Elements of Trespass.

I. **The Force.** Since force must be exercised, the trespass must be a positive act, and not the mere failure to act. Hence non-feasance, however wrongful, cannot constitute a trespass:

Hartley vs. Mcxham, *infra,* p. 267;
Vaux vs. Newman, *infra,* p. 268;
West vs. Nibbs, *infra,* p. 270;
Shorland vs. Govett, *infra,* p. 273.

The degree of force used is not material; it need not amount to violence. The authorities make a distinction between actual force, or violence, such as that in a battery or a forcible taking of goods, and force merely implied by law, such as is involved in walking upon the land of another or in seduction. It seems sufficient, however, for the purposes of our definition, to understand force as synonymous simply with bodily exertion and including all degrees of physical strenuosity; an unauthorized caress is as much a trespass as a blow with a bludgeon.

So the mere stretching of one's arm across the land of another, or the unfastening of another's horse, or the erection of a house or other structure which overhangs another person's land, is a trespass; and so it is to scratch the panel of a coach:

Fouldes vs. Willoughby, *infra,* p. 309.

The exertion of force requisite to constitute a trespass may be accomplished by other means than the trespasser's own bodily power, as by setting a dog upon the other person, or through other domestic animals which, being allowed to stray, go upon land not the property of their owner. So where material is so disposed upon one's land that natural forces will carry it upon the land of some one else, such disposal of material will render one liable for trespass:

Gregory vs. Piper, *infra*, p. 381.

Trespass may be committed against the person or the property of another, as in a battery, the unlawful entry upon his land, or the unlawful removal or injury of his goods. It is said also that trespass may be committed by an injury done with force to the absolute rights of another, as by carnal intercourse with his wife, or, according to later authorities, by seduction of his daughter. This form of trespass seems to have been recognized in accordance with the legal theory that a husband has a property in the person of his wife, so that any invasion of her bodily integrity is a forcible injury to his right as owner. The allowance of a trespass in the seduction of a daughter originated in cases where the seduction was effected in the parents' house, and was therefore the aggravation of a trespass committed by entering the house: Russell vs. Corne, 2 Ld. Raym, 1031 [1703]; whence the notion of trespass in such cases was, not quite logically, extended to seduction without any concomitant trespass to property.

II. **Direct Damage** is that directly and immediately resulting from the application of force, as the pain or other bodily injury produced by a blow, the detriment done to the grass, crops or buildings by going upon land, or the deprivation of one's property when one's goods are taken by a trespasser. Thus, in Gregory vs. Piper, above cited, the plaintiff suffered direct damage by the accumulation against his wall of the defendant's rubbish; and so direct damage is done where one pours water upon the land of another, or so diverts a stream that it discharges directly upon the other's land.

Where, on the other hand, the force exerted is spent without causing detriment, but afterwards, and as a consequence of the forcible act, some injury results from the doing of that act, such consequential and mediate detriment is only indirect damage, so that the act is not a trespass.

The classical illustration of this distinction is the supposed case of the Log Thrown into the Highway. If a log or other article is cast into a public way and in falling strikes a person there travelling, the act is a trespass, being the direct application of force and causing direct and immediate damage. But if the log falls harmlessly upon the road and afterwards some one in passing stumbles against the obstruction and is injured, the wrong done to the injured person is not a trespass, being only the indirect result of the force used in putting the log there; and for such merely consequential detriment the remedy is not an action of trespass, but, as we shall see, by another form of action which is called case:

Leame vs. Bray, *infra*, p. 253.

In accordance with this distinction, one does not commit a trespass by so obstructing a stream on his own land that the water floods the land of his neighbor, or by the merely negligent construction of a building, or by other use of his property whereby damage indirectly, and without the immediate application of force, results to another.

III. **Possession** by the plaintiff of the property affected is necessary because the essence of trespass is the disturbance of possession. Trespass is not in its nature an injury to title or ownership—though these also may be incidentally infringed—but it is wrongful because it violates the possessory right of another. Therefore, he who would complain of trespass must show that he was possessed of the property damaged.

In cases of trespasses to the person, as by battery and false imprisonment, the injured party is of course possessed of his own person; in trespass by seduction of a wife, the husband is conceived as in possession, *jure mariti*, of his wife's person.

The Character of the Possession requisite to entitle one to sue for a trespass to property depends upon the nature of the property, whether real or personal. In respect of real property the plaintiff must show either an actual possession or such constructive possession as is deemed equivalent to actual possession; to maintain trespass in respect of personal property, the plaintiff may show either actual possession or a right to take immediate possession of the property.

A. The actual possession of real property which is sufficient to sustain trespass is differently defined by the English and by the American courts.

(1) In England the requisite possession of realty must be a possession in fact. A person is deemed to be in actual possession of land when he is himself in physical occupation thereof, or when it is held for him by his servants or by some one in occupancy under his mere permission and for no definite term—as a poor relation: Turner vs. Doe, 9 M. & W. 645; Bertie vs. Beaumont, 16 East. 33—or so long as his goods remain upon the premises: Savage vs. Dent, 2 Strange, 1064. But if the premises are unoccupied and entirely vacant, there is no possession in anybody, and a trespass is not committed by entering upon the land without title or license.

(2) In the United States, generally, the owner of vacant land is deemed to be in possession according to his title, so that he may maintain an action for trespass; and such possession continues until the land is actually occupied by some one else: Van Brunt vs. Schenck, 11 Johnson, 377. 1 Poe, Pleading, p. 222.

Where one having title to a tract of land is in occupation of a part thereof, his possession is deemed to cover the tract to the extent of his title:

Green vs. Liter, *infra*, p. 252.

But where he occupies without title, his possession extends only to the limits of his actual occupation:

Aiken vs. Buck, *infra*, p. 251.

Neither in this country nor in England can the owner of land recover for a trespass committed thereon while the land is in the actual possession of another person than the owner, whether such person hold adversely to the owner or under him as a tenant by a valid letting for a definite term. Thus, where the plaintiff had demised premises to a tenant, and, during the term, the defendant cut some trees standing upon the land, the plaintiff was not allowed to recover damages in an action of trespass:

Campbell vs. Arnold, 1 Johnson, 511.

In such a case, trespass lies in favor of the tenant only, whose possession is disturbed, and whose recovery is to be measured by the extent of the injury done to his possessory right. If the value of the leased premises is permanently impaired, as by such a substantial injury as the felling of timber or by detriment done to the buildings or other structures on the land, the lessor may recover damages for these injuries to his reversionary interest in the premises by means of an action on the case, which is another form of action than trespass. But in that form he must allege and prove, not acts affecting merely the possessory right—such as an unlawful entry or temporary interference with the use of the property—but some lasting damage to the property itself which impairs its value:

Jackson vs. Pesked, 1 M. & S. 234.

In accordance with this principle, if the owner of land is wrongfully ejected by a trespasser, he may recover at once damages for the initial trespass by which he is dispossessed; but so long as the land is adversely held, he can not recover for any subsequent acts committed thereon, as for the intruder's reaping and selling the crops grown on the land. If, however, the ousted owner can, by legal action or otherwise, regain possession of his land, he may then maintain trespass for such acts done during his dispossession and recover damages for the intervening enjoyment—mesne profits—which the trespasser has taken of the premises:

Case vs. Shepherd, *infra,* p. 282;
Gent vs. Lynch, 23 Md. 64.

B. For trespass committed upon personal property, the action of trespass may be maintained by any one who is at the time either in actual possession or entitled to take immediate possession.

Where goods are wrongfully taken, injured or disturbed, damages for the trespass may be recovered by any person who is at the time in possession of them or by any person who has the right to the present possession. Therefore, one to whom the goods have been entrusted, as a carrier or other bailee, or one who as an officer has them in his official charge, may maintain the action of trespass for a disturbance of his possession. So, too, the owner of goods so wrongfully treated may recover for the trespass, though not presently possessed of the goods, provided that he is entitled to take possession at once; nor is it requisite that he should have ever been actually in possession. Thus, where the plaintiff had commissioned her brother to buy a cow for her when he should find one suitable, and he, about a fortnight afterward, bought a cow, which was seized by the defendant as the brother was driving the animal to his sister's home, the plaintiff was held entitled to maintain trespass:

Thomas vs. Phillips, 7 C. & P. 573.

If, on the other hand, the owner of goods against which a trespass is committed has so disposed of them that he is not at the time entitled to the possession thereof, he can not maintain trespass for the wrong done, the right of action on that account being only in the person whose possession is disturbed. Thus, where the owner of household furniture leased it for a term to a tenant, and the goods were taken under an execution against the tenant, the lessor was not entitled to maintain trespass because he had not the right to take immediate possession:

Ward vs. Macauley, *infra,* p. 247;
Gordon vs. Harper, *infra,* p. 317.

In such a case if the goods are destroyed or permanently injured, the owner may recover for his loss by an action upon the case.

Hall vs. Pickard, *infra,* p. 250.

But where the letting, hiring or other bailment is not for a definite term, and the owner is entitled at any time to terminate the arrangement and resume actual possession, he may recover in trespass upon the strength of his right to immediate possession:

Lotan vs. Cross, *infra,* p. 249.

Title in Trespass.

The Title requisite to maintain trespass, whether to real or personal property, is material only as it affects the right of present possession. The mere fact of possession entitles the holder to maintain trespass against any one who cannot show a better title or right to possess; and, therefore, against a wrong-doer, that is, one who is not better entitled than the one presently possessed, the possession itself is sufficient: Coal Co. vs. McCulloh, 59 Md. 416.

Thus, one who is in occupation of land under a title absolutely void may recover damages against one who, without title, trespasses upon the premises:

Graham vs. Peat. *infra,* p. 247.

So, where one entered upon vacant land without any pretense of title and remained in occupation until his death, but not long enough to acquire title by adverse possession, his devisee could maintain trespass against an intruder:

Asher vs. Whitlock, L. R. 1 Q. B. 1.

And trespass may be maintained by a maid-servant against one who unlawfully enters the bed-room which she occupies in her master's house:

Lewis vs. Ponsford, 8 C. & P. 687.

Or by a female guest against her host who enters, for improper purposes, the room in his house which she occupies by his invitation:

Newell vs. Whitcher. 53 Vt. 584.

The trespasser cannot defend by showing that, at the time of the trespass, the goods in the possession of the plaintiff were the property of a third person who was entitled to take possession of them whenever he should choose, unless the defendant can connect himself with the right of the third person—*jus tertii*—as by showing that he acted by the direction of that person:

Hammer vs. Wilsey, *infra,* p. 248.

Intention in Trespass.

The Intention of one who commits a trespass is immaterial; and, if the essential elements of trespass are present in the transaction, the trespasser cannot defend by showing that he did not intend to do any kind of wrong:

Weaver vs. Ward, *infra,* p. 252.

or that he did not know that he was trespassing:

Basely vs. Clarkson, *infra,* p. 252;
Higginson vs. York, *infra,* p. 267.

or that he supposed that he had legal authority which would justify him:

Wise vs. Withers, *infra,* p. 279.

or that the trespass was the result of an accident, unless it appear that it was an accident occurring without culpable negligence on the part of the defendant:

Leame vs. Bray, *infra,* p. 253.

The older cases, as has been observed, apparently import, even if they do not quite establish, that a purely accidental exercise of force against the person or property of another will constitute an actionable trespass, without regard to negligence in the matter; and even at the present time trespass will lie in the case of an accident where the plaintiff has been directly and forcibly injured—as by a collision—and the mischief is due to the negligence of the defendant; Leame vs. Bray. The manner and extent in which modern decisions have developed

inevitable accident—that is, misadventure without negligence—as a defence in such cases, is shown in

Brown vs. Kendall, *infra,* p. 255;
Parrott vs. Wells, *infra,* p. 259;
Stanley vs. Powell, *infra,* p. 262.

Excepting cases of inevitable accident, such as those just cited, it is not a defence in trespass that the trespasser was not aware that he was trespassing or that his act was due to ignorance or mistake; such excuses leave him still liable for compensatory damages:

Atlantic Coal Co. vs. Maryland Coal Co., 62 Md. 143.
Woodenware Co. vs. United States, 106 U. S. 432.

Justification of Trespass.

The Justification of Trespasses may be placed upon several grounds, for a complete enumeration of which reference must be had to the text-books. Of these grounds perhaps the principal is that the defendant acted by the authority of law, a form of defence which includes the execution of process, the right of the public to enter a tavern or the vehicle or premises of a common carrier, the right of a landlord to enter upon demised premises for the purpose of distraining for rent or to see that waste is not committed.

In the execution of process, the officer can not, in civil cases generally, make an entry into a dwelling house by breaking the outer door; and if he does, he is a trespasser:

Semayne's Case, *infra,* p. 275.

And it is a breaking if the door be closed, though not locked, so that the entry is effected by lifting the latch:

"It is enough that the outer door be shut. Then merely opening it is a breaking within the meaning of the law * * * What would be a breaking of the outer door in burglary is equally a breaking by the sheriff."

Curtis vs. Hubbard, 1 Hill, 336.

In the older cases it was said that, although the sheriff be a trespasser by breaking a house, yet if, being in, he levies his writ, the execution is good: Semayne's Case. But it is now generally held that an execution effected by trespass is invalid and will be set aside upon a showing of the unlawful means used:

Ilsley vs. Nichols, *infra,* p. 277.

Leave and License of the plaintiff, whereby the defendant was permitted to enter upon the plaintiff's land or to take his goods, is another ground upon which may be justified what would otherwise be a trespass. As a license is, in general, revocable at the pleasure of the donor, the proprietor or manager of a place of amusement may at any time revoke the permission to enter and remain in such place which is acquired by the purchase of a ticket, and the holder of the ticket may be required to withdraw for any reason satisfactory to the management, or for no reason at all:

Wood vs. Leadbitter, *infra,* p. 280;
Marrone vs. Jockey Club, *infra,* p. 282.

Trespass by Relation, or Trespass *ab Initio,* is committed where one enters the premises of another in virtue of some authority given by law and, being in thus lawfully, does upon the premises some act in abuse or excess of his authority and in the nature of a trespass. Thus, if a sheriff enters a house lawfully in the execution of a writ but remains in the house beyond the time reasonably necessary to complete the execution, his entire conduct from the beginning is deemed to be a trespass; and his act of entering, although at the time justified by his writ, is rendered unlawful by relation of his subsequent wrong: Ash vs. Dawnay, 8 Exch. 237. So also if the officer, having entered lawfully, seizes goods not within his writ, or commits other misbehavior in the nature of a trespass. Likewise, if a landlord rightfully takes his tenant's beast by way of distress, but afterwards works or kills the distrained chattel; or if a landlord enters warrantably upon premises in the possession of his tenant to view waste, but remains all night; or if

one, by license of law, enters a tavern, and does an act of trespass therein, in such cases, the original entry, although lawful when made, is converted into a trespass by the subsequent misconduct, and the entire transaction is wrongful from the beginning.

Upon this subject, however, two qualifications are to be borne in mind:

(1) The entry must have been in pursuance of some authority given by the law, and not in accordance with a permission given by an individual. Thus, one who enters a tavern may become a trespasser *ab initio* by an abuse of his legal right to enter; but one who enters a private house by the license of the owner and there does a wrongful act, although liable for the particular wrong done, does not become a trespasser by relation:

Dumont vs. Smith, *infra*, p. 269;
Allen vs. Crofoot, *infra*, p. 274.

(2) The act done after a lawful entry, in order to relate back and invalidate the entry, must be itself a trespass or at least be one in the nature of a trespass; hence a mere nonfeasance, though wrongful, does not make the delinquent a trespasser *ab initio*.

Six Carpenters' Case, *infra*, p. 268;
West vs. Nibbs, *infra*, p. 270.

Nor does an act which involves no force, as an attempt to extort money:

Shorland vs. Govett, *infra*, p. 273.

Trespass and Case.

Action of Case.—Since, to constitute a trespass, there must be a concurrence of force, direct damage and possession, if any one of these three elements be wanting, the act is not a trespass and no recovery for it as such can be had.

Thus an act not done with force is not a trespass, as a slander or a libel, the maintenance of a nuisance, or a deceit. So a wrong merely of omission, as negligence, as it involves no exer-

cise of force, is not a trespass; although the failure to use care may result in a trespass, as a collision.

Again, if the act done, though forcible, does not cause direct and immediate damage, the wrong is not trespass. As in the case, above mentioned, of the log thrown into the highway. So where one maliciously and without probable cause procures another to be arrested by legal process, as upon a charge of crime, the wrongful act, the negotiation of the warrant, does not immediately and of itself cause injury, but only indirectly and by its consequence; hence trespass does not lie for a malicious prosecution.

So where trespass is committed upon property not at the time in the possession of its owner, he can not, as we have seen, recover damages for the trespass, but must claim redress only for the injury done to his reversionary right. And property which is not susceptible of physical possession, as an incorporeal hereditament, can not be the subject of a trespass, though it be injured by the exercise of force: therefore trespass lies not for the obstruction of a right of way or the impairment of a franchise.

The remedy for wrongs which, for such reasons as these are not within the definition of trespass, is by another form of action called properly Trespass upon the Case, which name is for the sake of convenience usually abbreviated to Case. Thus, we say that for a battery or an unlawful taking of goods trespass lies; but for slander, malicious prosecution or the obstruction of a right of way the action must be in case.

Accordingly, if one turns water directly upon the land of another, it is a trespass; but if by damming a stream on his own land he causes an overflow which floods the other person's land, the consequential injury is within the scope of case. If one sets a vicious dog upon another, the act is a trespass; but if, by the negligent keeping of the dog, it escapes and injures the other person, the damages are to be sought in an action of case. Where one directs his servant to commit a trespass, or where the servant commits a trespass within the scope of his employ-

ment and by the implied authority of his master, trespass lies against the master.

Gregory vs. Piper, *infra,* p. 381;
Axman vs. Gaslight Co., *infra,* p. 384.

But where the act, though amounting to a trespass by the servant, is done by him through his negligence and without the authority or direction of his master, the master is liable—if liable at all—not for the trespass but for his antecedent negligence or other default in the selection of the servant; and this liability is to be enforced, not in trespass, but in case:

McManus vs. Crickett, *infra,* p. 387.

Where the plaintiff had a right of way over ground belonging to another person and the defendant obstructed the passage by wrongfully depositing his goods in the way, this was a trespass against the owner of the soil, but the remedy of the plaintiff was by an action in case:

Williams vs. Esling, *supra,* p. 44.

In some situations the person injured has an election between suing in trespass and suing in case. Thus, if the defendant, by his negligent driving, runs against the plaintiff, the latter may treat the injury as a trespass, there being an exertion of force and direct damage to the person; or he may sue in case, conceiving the wrong to lie in the negligence anterior to the collision, and regarding the damage sustained as the consequence of the negligence rather than as the direct result of the collision. So for the seduction of a wife or a daughter, the injured husband or father may elect to consider his injury as a trespass, in that it involves an assault upon his wife or his servant; or he may conceive his cause of action as the loss of the wife's society or the daughter's service, which are only consequences of the defendant's wrongful act and therefore redressible by an action in case.

Possession.

Ward vs. Macauley, 4 Term Rep. 489. King's Bench (1791).

Ward, being the owner of a dwelling-house and certain furniture therein, leased the house so furnished to Lord Montfort. A creditor, who had a judgment against Lord Montfort issued an execution on that judgment; and under the execution, the defendants, who were the sheriffs of Middlesex, seized part of the furniture in the house occupied by Lord Montfort, although the officer had notice that it was the property of Ward. For this Ward brought an action of trespass against Macauley and his co-sheriff.

Held, that trespass could not be maintained upon the facts shown, because the plaintiff was neither in actual possession of the goods nor entitled to the possession thereof, he having parted with possession and the right thereto for the term of the lease. *Held,* also, but only *obiter,** that in such a case trover would lie; which suggestion was disapproved in Gordon vs. Harper, 7 Tenn. R. 9, which is stated *infra.*

LORD KENYON, C. J.: The distinction between the actions of trespass and trover is well settled; the former is founded on possession, the latter on property. Here the plaintiff had no possession; his remedy was by an action of trover founded on his property in the goods taken.

Graham vs. Peat, 1 East, 244. King's Bench (1801).

Graham was in possession of a tract of land belonging to the church, which land the rector had demised to him as a part of the rector's glebe. The rector was not in law competent to dispose of the land and the lease was void by reason of a statute applicable to the case. Peat committed a trespass upon the

*MARSHALL, C. J.: It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of the maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated: Cohens vs. Virginia, 6 Wheaton, 264, 399. On the same point are Bardes vs. Bank, 178 U. S. 524; Bryan vs. Bernheimer, 181 U. S. 188; *Re* City Bank of New Orleans, 8 How. 292.

leased land, for which act this suit was brought. The defence was that Graham had no title, and so, as it was argued, could not recover for a disturbance to his unauthorized possession.

Held, that the plaintiff's bare possession, though without title, was sufficient to enable him to maintain trespass against the defendant, who had neither title nor possession.*

LORD KENYON, C. J.: There is no doubt but that the plaintiff's possession in this case was sufficient to maintain trespass against a wrongdoer; and, if he could not have maintained an ejectment upon such a demise, it is because that is a fictitious remedy founded upon title. Any possession is a legal possession against a wrongdoer.

Hanmer vs. Wilsey, 17 Wendell, 91. New York (1837).

Wilsey owned a horse which he mortgaged to Colgrove to secure the payment of a certain indebtedness. Default having been made in such payment, Colgrove became entitled to the horse, which, however, he suffered to remain in the possession of Wilsey. In this state of affairs, Hanmer brought an action against Wilsey before a justice of the peace for a debt owed by Wilsey to Hanmer; in this action the plaintiff procured the issue of a writ of attachment, under which a constable took the mortgaged horse from Wilsey's possession. The attachment proceedings were defective; and, upon the discovery of this fact, the constable offered to return the horse to Wilsey. The latter declined to accept the horse, and at once brought the present action of trespass against Hanmer. About the same time Colgrove also sued Hanmer for the taking of the horse. At the trial of the suit brought by Wilsey, Hanmer offered to show that Colgrove was entitled to the horse and had asserted his title by suing Hanmer, and that Wilsey had been merely in possession of the horse by the sufferance of Colgrove and quite without title. *Held,* that Wilsey was entitled to maintain an action of trespass by virtue of his possession, and that Hanmer could not defend by showing the title of Colgrove, with which he did not connect himself.

BRONSON, J.: It was sufficient to maintain the action of trespass that the plaintiff had the actual possession of the horse at the time of the illegal taking. The defendant did not attempt to justify under, nor

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*LORD MANSFIELD, C. J.: Whoever is in possession may maintain an action of trespass against a wrongdoer to his possession; Harker vs. Birkbeck, 3 Burrow, 1563.

WILLES, C. J.: Trespass is a possessory action founded merely on the possession, and it is not at all necessary that the right should come in question; Lambert vs. Stroother, Willes, 221.

Where the plaintiff sued in trespass, alleging his possession, and the defendant in his plea set up a title in himself, it was held sufficient for the plaintiff in his replication to deny the title alleged on the other side; since, if that title should be disproved, the case would stand upon the plaintiff's possession, which was not denied; Cary vs. Holt, 2 Strange, 1238.

in any way to connect himself with, Colgrove, the mortgagee of the horse; and it is no answer in trespass *de bonis asportatis* to show property out of the plaintiff and in a stranger; Demick vs. Chapman, 11 Johns. 132; Cook vs. Howard, 13 *id.* 276. The evidence in relation to the mortgage was properly overruled.

Should the offer to return the horse have been considered by the jury in mitigation of damages? The plaintiff's right of action was not only complete before the offer was made, but the suit was actually commenced, and no offer was made to pay the costs that had accrued, * * * The plaintiff was, no doubt, very diligent in commencing legal proceedings, but the defendant was irregular, and acted at his peril in taking the property.

But, independent of the fact that the plaintiff had commenced legal proceedings, there was no ground for mitigating the damages. The horse had been wrongfully taken, and the plaintiff had the right to insist on being paid the value. The actual return of the horse to the plaintiff's stable, without his assent, was a matter of no legal consequence. If the plaintiff had consented to receive the property, it would not have defeated his action altogether. It is not a defence which can be pleaded; it goes only to the question of damages; Vosburgh vs. Welch, 11 Johns. 175; Gibbs vs. Chase, 10 Mass. 128. The plaintiff refused to receive the property, and insisted on his legal right to recover the value as well as damages for the illegal taking. It can make no difference in principle that the horse was kept only a short time. The injury was complete, and the plaintiff's right of action was as perfect, the moment after the horse was first led from his stable as it could have been after the lapse of a month or a year.

Lotan vs. Cross, 2 Campbell, 464. Nisi Prius (1810).

The plaintiff had lent his chaise to his friend Brown, without charge and for no definite time. Whilst Brown was using the chaise, it was damaged by a collision with the defendant's vehicle, the accident being the result of negligent driving on the part of the defendant. The plaintiff brought an action of trespass. The defendant objected that it could not be a case of trespass, the plaintiff having been out of possession. *Held,* that the plaintiff was constructively in possession of the chaise, such possession not being terminated by the gratuitous and revocable bailment to Brown.

LORD ELLENBOROUGH: The property is proved to be in the plaintiff, and, *prima facie*, the thing is to be considered in his legal possession, whoever may be the actual occupier. Show a letting for a certain term to Brown, and the possession would be in him: but a mere gratuitous permission to a third person to use a chattel does not, in contemplation

of law, take it out of the possession of the owner; and he may maintain trespass for any injury done to it while it is so used. * * *

The injury to the plaintiff being immediate from the act done by the defendant, it was settled in Leame vs. Bray [3 East 393, *infra*], that trespass is the proper remedy, and the defendant's intentions were immaterial. [Verdict for the plaintiff.]

Hall vs. Pickard, 3 Campbell, 186. Nisi Prius (1812).

The plaintiff, being the owner of two horses, had hired them for a certain period to Dr. Carey. During the term and whilst the horses were in use by the doctor, one of them was killed in a collision with the defendant's cart which was caused by the defendant's furious and reckless driving. The plaintiff sued in case. The defendant suggested that, on the plaintiff's proof, the action should have been trespass. *Held,* that case, and not trespass, was the proper form, the plaintiff not having been in possession of the horse, and not having been entitled to the possession, at the time of the accident.*

LORD ELLENBOROUGH: This is in the nature of an injury to the plaintiff's reversion. He was not in possession of the horses, and, according to the authority of Gordon vs. Harper [7 T. R. 9, *infra*], he neither could have maintained trespass nor trover for them. This not like a gratuitous permission to use a chattel, as in Lotan vs. Cross [2 Campb.

*"Legal possession does not necessarily coincide either with actual physical control or the present power thereof (the *detention* of Continental terminology,) or with the right to possess (constantly called *property* in our books); and it need not have a rightful origin. The separation of detention, possession in the strict sense, and the right to possess, is both possible and frequent. A. lends a book to B., gratuitously and not for any fixed time, and B. gives the book to his servant to carry home. Here B.'s servant has physical possession, better named custody or detention, but neither legal possession nor the right to possess; B. has legal and rightful possession, and the right to possess as against every one but A.; while A. has not possession, but has a right to possess which he can make absolute by determining the bailment to B., and which the law regards for many purposes as if it were already absolute"; Pollock on Torts (Wood's ed.), p. 418. To which in a note Mr. Pollock adds, referring to the character of the servant's possession in the case supposed: "Yet it is not certain that he could not maintain trespass against a stranger; see Moore vs. Robinson, 2 B. & Adolph. 817. The law about the custody of servants and persons in a like position has vacillated from time to time and has never been defined as a whole."

Moore vs. Robinson, supra, decided in 1831, was trespass brought by the master of a flyboat, which was navigated upon a canal, for damage done by the defendant to the rope by which the boat was drawn. The boat and the rope were the property of the canal company. The plaintiff was hired by the company at weekly wages to operate the boat. He employed a mate to assist him, who was paid by the master himself. It was objected that the plaintiff had no title to, or legal possession of, the rope, being "but a mere servant, like the carter who drives a cart." But the court held the plaintiff entitled to sue in trespass: "The plaintiff was intrusted with the management of the vessel, and had a person under him."

464, *supra*], where the possession constructively remained in the owner. The horses were let for hire for a certain term to Dr. Carey, who had a right to retain them till that was expired, and who was driving them by his own servants when the mischief was done. Case, therefore, was here the proper and only remedy. It may likewise be worthy of consideration, whether, in those instances where trespass may be maintained, the party may not waive the trespass and proceed for the tort. [Verdict for the plaintiff.]

Aikin vs. Buck, 1 Wendell, 466. New York (1828).

A body of wild and unenclosed woodland had been surveyed and designated as lot No. 210, but the title thereto, if it had passed from the State, was not in either of the parties to this cause. The Peru Iron Company, however, on some theory, claimed a right to the entire lot, and was in actual occupation of the southern part thereof, where the company was working a bed of iron ore and had a house occupied by a tenant of the company, the company's property and business being in the charge of Aikin as agent. Another person claimed a possessory right to 30 acres at the northern end of lot, and on that tract he had cut some trees, the logs of which he sold to Buck and others. These purchasers had the logs marked and accepted where they lay by an agent, and left them on the ground. Before the plaintiffs were ready to remove the property, it was taken and carried away by Aikin, professing to act for the company. Buck and his associates sued Aikin in trespass. *Held,* that they were entitled to recover the value of the logs taken, the actual possession of the land wherein the trees were cut being in the vendor of the logs, and the possession of the company not extending beyond the limits of its actual occupation.

SUTHERLAND, J.: The plaintiffs shewed a sufficient possession of the property to enable them to maintain the action. The logs were actually received and marked by the agent of the plaintiffs, and left upon the bank of the river Au Sable, upon land belonging to or claimed by the Peru Iron Company. The plaintiffs had such a right to the logs, *prima facie*, as to be entitled to take them into their actual possession whenever they pleased; and this is sufficient to maintain the action.

The defendant failed entirely in his defence. The logs were cut on the north end of Lot 210 in Maule's patent, and the defendant proved a possession of a dwelling house and the working of an ore bed on the south end of the lot, by himself and the Peru Iron Company, and contends that that gave him or the company, constructively, the possession

of the whole lot. In this he was mistaken. He showed no deed for the lot; his possession was therefore confined to the land actually occupied by him, or the company, and cannot be extended by construction to a single acre beyond it.

Green vs. Liter, 8 Cranch, 229, 250; Per Story, J.:

"The general rule is, that, if a man enter into lands, having title, his seisin is not bounded by his actual occupancy, but is held to be coextensive with his title. But if a man enter without title, his seisin is confined to his possession by metes and bounds. . . . If a man, having title to land, enter into a part in the name of the whole, he is, upon common law principles, adjudged in seisin of the whole, notwithstanding an adverse seisin thereof. But if the land be in the seisin of several tenants, claiming different parts thereof in severalty, an entry into the parcel held by one tenant will not give seisin of the parcels held by the other tenants. By parity of reason, an entry into a parcel which is vacant, will not give a seisin of a parcel which is in an adverse seisin. But an entry into the last parcel, in the name of the whole, will enure as an entry into the vacant parcel."

Intention.

Basely vs. Clarkson, 3 Levinz, 37. King's Bench (1681).

Trespass for breaking his close called the balk and the hade, and cutting his grass and carrying it away. The defendant disclaims any title in the lands of the plaintiff, but says that he hath a balk and hade adjoining to the balk and hade of the plaintiff, and in mowing his own land he involuntarily and by mistake mowed down some grass growing upon the balk and hade of the plaintiff, intending only to mow the grass upon his own balk and hade, and carried the grass, etc., *quae est eadem,* etc. *Et quod ante emanationem brevis* he tendered to the plaintiff 2s. in satisfaction; and that 2s was sufficient amends. Upon this the plaintiff demurred and had judgment; for it appears the fact was voluntary, and his intention and knowledge are not traversable: they cannot be known.

Weaver vs. Ward, Hobart, 134. King's Bench (1616).

Weaver brought an action of trespass of assault and battery against Ward. The defendant pleaded that he was, amongst others, by the commandment of the lords of the council, a

trained soldier in London, of the band of one Andrews, captain, and so was the plaintiff; and that they were skirmishing with their muskets charged with powder for their exercise *in re militari* against another captain and his band; and as they were so skirmishing, the defendant, *"casualiter et per infortunium et contra voluntatem suam,"* in discharging his piece, did hurt and wound the plaintiff; which is the same, *"absque hoc,"* that he was guilty, *"aliter sive alio modo."* And, upon demurrer by the plaintiff, judgment was given for him; for, though it was agreed that, if men tilt or tourney in the presence of the king, or if two masters of defense playing their prizes kill one another, that this shall be no felony, or if a lunatic kill a man, or the like; because felony must be done, *"animo felonico"*; yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore, if a lunatic hurt a man, he shall be answerable in trespass, and, therefore, no man shall be excused of a trespass (for this is the nature of an excuse, and not of justification, *prout ei bene licuit*) except it may be judged utterly without his fault; as if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt.

Leame vs. Bray, 3 East, 593. King's Bench (1803).

This was an action of trespass on account of a collision between the plaintiff's curricle and the defendant's chaise, which resulted from the fact that the defendant was driving on the wrong side of the road on a dark night. Had he been on the right side (which in England is the left side) there was ample room for the carriages to pass. The defendant was not otherwise in fault than by being on the wrong side of the road, and he had not driven violently or at any unusual speed. It was objected in defence that this was not a case of trespass but for an action on the case for negligence. But the court held that the action was properly brought, and that the force requisite to produce the collision, together with the damage immediately

resulting therefrom, were sufficient to constitute a trespass, without regard to the defendant's intention.

In the course of the argument occurred this colloquy:

Gibbs (counsel for defendant): Here the continuing motion of the carriage was not the immediate act of the defendant.

LORD ELLENBOROUGH, C. J.: If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass.

Gibbs: The case of throwing the squib [Scott vs. Shepherd, 3 Wils. 403; 2 W. Bl. 892], was put upon that ground, but that has never been approved since.

LORD ELLENBOROUGH: That case, to be sure, goes to the limit of the law.

LAWRENCE, J.: The question is, whether the injury be immediate from an act done by the defendant, or whether it be consequential only from such act. If one turning round suddenly were to knock another down, whom he did not see, without intending it, no doubt the action must be trespass.

The passages which follow are from the opinions delivered.

LORD ELLENBOROUGH: The true criterion seems to be according to what LORD C. J. DEGREY says in Scott vs. Shepherd, whether the plaintiff received the injury by force from the defendant. If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis* by all the cases both ancient and modern. It is immaterial whether the injury be willful or not. As in the case alluded to by my brother GROSE, where one shooting at butts for a trial of skill with the bow and arrow, the weapon then in use, in itself a lawful act, and no unlawful purpose in view; yet having accidentally wounded a man, it was holden to be a trespass, being an immediate injury from an act of force by another. Such also was the case of Weaver vs. Ward, in Hobart, 134, where a like unfortunate accident happened whilst persons were lawfully exercising themselves in arms. So in none of the cases mentioned in Scott vs. Shepherd did willfulness make any difference. * * *

LAWRENCE, J.: In actions of trespass the distinction has not turned either on the lawfulness of the act from whence the injury happened or the design of the party doing it to commit the injury; but, as mentioned by MR. JUSTICE BLACKSTONE in Scott vs. Shepherd, on the difference between injuries direct and immediate, or mediate and consequential; in the one instance the remedy is by trespass, in the other by case.

LE BLANC, J.: But in all the books the invariable principle to be collected is, that where the injury is immediate on the act done, there trespass lies; but where it is not immediate on the act done, but consequential, there the remedy is in case. And the distinction is well instanced by the example put of a man's throwing a log into the highway; if, at the time of its being thrown, it hit any person, it is trespass; but if, after it be thrown, any person going along the road receive an injury by falling over it as it lies there, it is case. Nor does the degree of violence with which the act is done make any difference; for, if the log were put down in the most quiet way upon a man's foot, it would be trespass; but if thrown into the road with whatever violence, and one afterwards fall over it, it is case and not trespass. So, here, if the defendant had simply placed his chaise in the road, and the plaintiff had run against it in the dark, the injury would not have been direct, but in consequence only of the defendant's previous improper act. Here, however, the defendant was driving the carriage at the time with the force necessary to move it along, and the injury to the plaintiff resulted from that immediate act; therefore the remedy must be trespass; and all the cases will support that principle.

Brown vs. Kendall, 6 Cushing, 292. Massachusetts (1850).

This was an action for trespass for assault and battery, originally commenced against George K. Kendall, the defendant, who died pending the suit, and his executrix was summoned in.

It appeared in evidence, on the trial, which was before WELLS, C. J., in the court of common pleas, that two dogs belonging to the plaintiff and the defendant, respectively, were fighting in the presence of their masters; that the defendant took a stick about four feet long, and commenced beating the dogs in order to separate them; that the plaintiff was looking on, at the distance of about a rod, and that he advanced a step or two toward the dogs. In their struggle, the dogs approached the place where the plaintiff was standing. The defendant retreated backward from before the dogs, striking them as he retreated; and as he approached the plaintiff, with his back toward him, in raising his stick over his shoulder, in order to strike the dogs, he accidently hit the plaintiff in the eye, inflicting upon him a severe injury.

Whether it was necessary or proper for the defendant to interfere in the fight between the dogs; whether the interference, if called for, was in a proper manner, and what degree of care was exercised by each party on the occasion; were the sub-

ject of controversy between the parties, upon all the evidence in the case, of which the foregoing is an outline.

The jury under certain instructions which sufficiently appear in the opinion of the court, returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.

SHAW, C. J.: This is an action of trespass, *vi et armis*, brought by George Brown against George K. Kendall, for an assault and battery; and the original defendant having died pending the action, his executrix has been summoned in. The rule of the common law, by which this action would abate by the death of either party, is reversed in this commonwealth by statute, which provides that actions of trespass for assault and battery shall survive. Rev. Sts., chap. 93, sec. 7.

The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage is done is responsible for it. We use the term "unintentional" rather than involuntary, because in some of the cases, it is stated that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case, any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass *vi et armis lies;* if consequential only, and not immediate, case is the proper remedy. *Leame vs. Bray*, 3 East, 593; *Hugget vs. Montgomery*, 2 N. R. 446, Day's Ed. and notes.

In these discussions, it is frequently stated by judges, that when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such, that some action will lie. These *dicta* are no authority, we think, for holding that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither willful, intentional or careless. In the principal case cited, *Leame vs. Bray*, the damage arose from the act of the defendant, in driving on the wrong side of the road, in a dark night, which was clearly negligent if not unlawful. In the course of the argument of that case (p. 595), LAWRENCE, J., said: "There certainly are cases in the books where, the injury being direct and immediate, trespass has been holden to lie, though the injury was not intentional." The term "injury" implies something more than damage; but, independently of that consideration, the propo-

sition may be true, because, though the injury was unintentional, the act may have been unlawful or negligent, and the cases cited by him are perfectly consistent with that supposition. So the same learned judge in the same case says (p. 597): "No doubt trespass lies against one who drives a carriage against another, whether done wilfully or not." But he immediately adds, "Suppose one who is driving a carriage is negligently and heedlessly looking about him, without attending to the road when persons are passing, and thereby runs over a child and kills him, is it not manslaughter? and if so, it must be trespass; for every manslaughter includes trespass;" showing what he understood by a case not wilful.

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the *intention* was unlawful, or that the defendant was *in fault;* for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev., secs. 85 to 92; *Wakeman vs. Robinson*, 1 Bing. 213. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. *Davis vs. Saunders*, 2 Chit. R. 639; Com. Dig. Battery, A. (Day's Ed.), and notes; *Vincent vs. Stinehour*, 7 Vt. 69. In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both the plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he acci-

dentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. Or if the defendant was chargeable with some negligence, and if the plaintiff was also chargeable with negligence, we think the plaintiff cannot recover without showing that the damage was caused wholly by the act of the defendant, and the plaintiff's own negligence did not contribute as an efficient cause to produce it.

The court instructed the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterward given, that if the jury believed, that the act of interference in the fight was unnecessary (that is, as before explained), not a duty incumbent on the defendant), then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. 2 Greenl. Ev., sec. 85; *Powers vs. Russell*, 13 Pick. (Mass.) 69, 76; *Tourtellot vs. Rosebrook*, 11 Metc. 460.

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the context, may have intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover. *New trial ordered.*

The Nitro-Glycerine Case (Parrott vs. Wells Fargo & Co.), 15 Wallace, 524. Supreme Court of the United States (1872).

The defendants conducted an express business, which consisted largely in the forwarding of goods from New York to San Francisco by way of the Isthmus of Panama. The plaintiff owned a large building in San Francisco, the basement and the first floor of which were leased to the defendants and used by them for office purposes and for the storage of the goods entrusted to them. In March of 1866, an unknown person delivered on the defendants' dock in New York a box for shipment to some point in California. This article was an ordinary wooden box, about two and a half feet square, and weighing three hundred and twenty-nine pounds. The box was clean and in apparently good condition, with nothing about it to indicate what it contained or to suggest any suspicion; and the shipper said nothing as to its contents, nor were any questions on that subject asked. A few days later the box was forwarded by steamer from New York and it arrived by the Pacific steamer at San Francisco about the middle of April. On taking the box from the vessel, it was found to be leaking, the leakage having the appearance of sweet oil. In accordance with a rule of defendants' business concerning damaged goods, the box was taken to the office in the Parrott building for examination. An employé was directed to open it with a mallet and chisel. This he proceeded to do, with the result that the contents exploded, killing all persons present, wrecking the building and destroying a large amount of adjacent property.

The explosive contents of the box were ascertained to be nitroglycerine. This substance, though discovered by a French chemist in 1847, had been, in 1866, almost altogether the subject of experiments in the laboratory, and had been manufactured only for scientific purposes and in small quantities. Although introduced to a limited extent into some quarries and mines in Europe, it had not become an article of ordinary commerce, and its appearance and properties were almost wholly unknown to the public.

Parrott brought this action against the defendants for the damage done to his building. The case was tried by the court without a jury, and the court found that neither the defendants nor any of those in their employ who had been concerned in the shipment of the nitro-glycerine had any knowledge, or means of knowledge, or cause of suspicion, respecting the contents of the box, nor did any of them know anything at all about nitro-glycerine. It was likewise found that none of these persons had been guilty of any negligence in the transaction.

The plaintiff contended that, notwithstanding the facts so found, the defendants were liable for the destruction of his building, on the ground that that catastrophe had been brought about by the negligent bringing of a dangerous article upon the premises.

Held, that the facts did not establish negligence upon the part of the defendants, and that they were not liable for the results of the explosion, that being an inevitable accident.

FIELD, J.: It appears from the record that the court finds, that neither the defendants, nor any of their employees, nor any of the employees of the Pacific Mail Steamship Company, who had anything to do with the case of nitro-glycerine, knew the contents of the case, or had any means of such knowledge, or had any reason to suspect its dangerous character, and that they did not know anything about nitro-glycerine, or that it was dangerous. And it also appears that the court finds, that there was no negligence on the part of the defendants in receiving the case, or in their failure to ascertain the dangerous character of the contents; and, in view of the condition of their knowledge, of the want of means of knowledge, and in the absence of any reasonable ground of suspicion, that there was no negligence in the handling of the case at the time of the explosion. * * * It is urged here, that, as matter of law, they are chargeable with notice of the character and properties of the merchandise in their possession, and of the proper mode of handling and dealing with it, and were consequently guilty of negligence in receiving, introducing, and handling the box cotaining the nitro-glycerine.

If express carriers are thus chargeable with notice of the contents of packages carried by them, they must have the right to refuse to receive packages offered for carriage without knowledge of their contents. It would, in that case, be unreasonable to require them to accept, as conclusive in every instance, the information given by the owners. This doctrine would be attended in practice with great inconvenience, and would seldom lead to any good. Fortunately the law is not so unreasonable. It does not exact any such knowledge on the part of the carrier, nor permit him, in cases free from suspicion, to require infor-

mation as to the contents of the packages offered as a condition of carrying them. This was ruled directly by the Common Pleas in England in the case of Crouch vs. The London & Northwestern Railway, 14 C. B. 291. * * *

It not, then, being his duty to know the contents of any package offered to him for carraige, when there are no attendant circumstances awakening his suspicions as to their character, there can be no presumption of law that he had such knowledge in any particular case of that kind, and he cannot accordingly be charged as matter of law with notice of the properties and character of packages thus received. * * * The defendants, being innocently ignorant of the contents of the case, received in the regular course of their business, were not guilty of negligence in introducing it into their place of business and handling it in the same manner as other packages of similar outward appearance were usually handled. "Negligence" has been defined to be 'the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." [Blyth vs. Birmingham Water Works, 11 Exchequer, 784.] It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon anyone who takes the usual precautions against accident which careful and prudent men are accustomed to take under similar circumstances.

The case of Pierce vs. Windsor, 2 Clifford, 18, furnishes a pertinent illustration of this doctrine. There a general ship was put up for freight. Among other freight offered and taken was mastic, an article new in commerce, and which was so affected by the voyage that it injured other parts of the cargo in contact with it, and caused increased expenditure in discharging the vessel. The court held the shipper and not the charterer liable, and observed that "the storage of the mastic was made in the usual way, and it is not disputed it would have been proper, if the article had been what it was supposed to be, when it was received and laden on board. Want of greater care in that behalf is not a fault, because the master had no means of knowledge that the article required an extra care or attention beyond what is usual in respect to other goods."

This action is not brought upon the covenants of the lease; it is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants; unless that be established, they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of.

The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a *prima facie* case, which the carrier must overcome. His contract is shown, *prima facie* at least, to have been violated by the injury. Outside of these cases, in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances; and, if he has not, the plaintiff must prove it.

Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune. * * *

And the principle is not changed whether the injury complained of follows directly or remotely from the act or conduct of the party. The direct or remote consequences of the act or conduct may determine the form of the action, whether it shall be case or trespass, where the forms of the common law are in use, but cannot alter the principle upon which liability is enforced or avoided. In Brown vs. Kendall (6 Cushing, 295), which was before the Supreme Court of Massachusetts, the action was in trespass for assault and battery. The defendant was trying to part two dogs, fighting, and, in raising his stick for that purpose, accidentally struck the plaintiff in the eye, injuring it severely. The court, MR CHIEF JUSTICE SHAW delivering the opinion, held that the defendant was doing a lawful and proper act, which he might do by the use of proper and safe means; and that, if in so doing, and while using due care and taking all proper precautions necessary to the exigency of the case to avoid hurt to others, the injury to the plaintiff occurred, the defendant was not liable therefor, and that the burden of proof was on the plaintiff to establish a want of due care on the part of the defendant. In Harvey vs. Dunlop (Lalor's Rep. 193), which was before the Supreme Court of New York, the action was trespass for throwing a stone at the plaintiff's daughter, by which her eye was put out. It did not appear that the injury was inflicted by design or carelessness, but on the contrary that it was accidental, and it was held that the plaintiff could not recover. "No case or principle can be formed," said MR. JUSTICE NELSON, in denying a new trial, "or, if found, can be maintained, subjecting an individual to liability for an act done without fault on his party," and in this conclusion we all agree.

Stanley vs. Powell, 1 Q. B. D. 86 (1891). Queen's Bench (1891).

The defendant and several others were engaged in pheasant shooting. The plaintiff was employed by one Greenwood, the member of the shooting party who owned the right to shoot, to carry cartridges and the game that should be shot. The defendant fired at a bird, which was not in the direction in

which the plaintiff stood; the shot was diverted by glancing upon a tree and struck the plaintiff, causing him serious injury. The plaintiff having brought this action, and evidence being given of the facts just stated, the jury were required to find whether or not that evidence established negligence on the part of the defendant; and this question they answered in the negative. In the argument on the motion for judgment, the plaintiff, relying upon divers ancient authorities, insisted that, on the ascertained facts of the case, the defendant was liable as for a trespass, the cases cited being supposed to establish such liability without regard to the defendant's intention in the matter or to the absence of negligence on his part. The cases mentioned were reviewed by Denman, J., in his opinion, and held not to sustain the contention based upon them, and judgment was rendered in favor of the defendant.

DENMAN, J.: It was contended on his (the plaintiff's) behalf that this was a case in which an action of trespass would have lain before the Judicature Acts; and this contention was mainly founded on certain *dicta* which, until considered with reference to those cases in which they are uttered, seem to support that contention; but no decision was quoted, nor do I think that any can be found which goes so far as to hold, that if A. is injured by a shot from a gun fired at a bird by B., an action of trespass will necessarily lie, even though B. is proved to have fired the gun without negligence and without intending to injure the plaintiff or to shoot in his direction.

The jury having found that there was no negligence on the part of the defendant, the most favorable way in which it is now possible to put the case of the plaintiff is to consider the action as brought for a trespass, and to consider that the defendant has put upon the record a defense denying negligence, and specifically alleging the facts, sworn to by his witnesses, which the jury must be considered to have found proved, and then to consider whether those facts, coupled with the absence of negligence established by the jury, amount to an excuse in law. The earliest case relied upon by the plaintiff was one in the year-book, 21 Hen. 7, 28 A., which is referred to by GROSE, J., in the course of the argument in Leame vs. Bray, 3 East. 593, to be mentioned presently, in these words: "There is a case put in the year-book, 21 Hen. 7, 28 A, that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be trespass." Returning to the case in the year-book, it appears that the passage in question was a mere dictum of REDE, who (see 5 Foss' Lives of the Judges, p. 230,) was at the time (1506) either a judge of the King's Bench or C. J. of the Common Pleas, which he became in October in that year, in a case of a very different kind from that in question, and it only amounts to

a statement that an action of trespass may lie even where the act done by the defendant is *unintentional*. The words relied on are, "*Mes ou on tire a les buts et blesse un home, coment que est incontre sa volonte, il sera dit un trespassor incontre son entent.*" But in that very passage REDE makes observations which shew that he has in his mind cases in which that which would be *prima facie* a trespass may be excused. The next case in order of date relied upon for the plaintiff was Weaver vs. Ward, Hob. 134, decided in 1607. There is no doubt that that case contains *dicta* which *per se* would be in favor of the plaintiff, but it also contains the following summing up of the law applicable to cases of unintentional injury by acts which are *prima facie* trespasses. "Therefore, no man shall be excused of a trespass . . . except that it may be judged utterly without his fault," shewing clearly that there may be such cases. That case, after all, only decided that where the plaintiff and defendant were skirmishing as soldiers of the trainband, and the one, "*casualiter, et per infortunium, et contra voluntatem suam*" (which must be translated "accidentally and involuntarily") shot the other, an action of trespass would lie, *unless* he could show that such involuntary and accidental shooting was done under such circumstances as utterly to negative negligence. Such case may easily be supposed, in which there could be no two opinions about the matter; but other cases may, as the present case did, involve considerable conflict of evidence and opinion which until recently a jury only could dispose of. The case of Gibbons vs. Pepper, 4 Mod. 404, decided in 1695, merely decided that a plea, shewing that an accident caused by a runaway horse was *inevitable*, was a bad plea in an action of trespass, because if *inevitable*, that was a defense under the general issue. It was a mere decision on the pleading, and laid down nothing as regards the point raised in the present case. The concluding words of the judgment, which shew clearly the *ratio decidendi* of that case are these: "He should have pleaded the general issue, for if the horse ran away against his will he would have been found *not guilty*, because in such a case it cannot be said with any color of reason to be a battery in the rider." The more modern cases of Wakeman vs. Robinson, 1 Bing. 213, and Hall vs. Fearnley, 3 Q. B. 919, lay down the same rule as regards the pleading point, though the former case may also be relied upon as an authority by way of dictum in favor of the plaintiff, and the latter may be fairly relied upon by the defendant; for WIGHTMAN, J., in his judgment explains Wakeman vs. Robinson thus: "The act of the defendant" (viz., driving the cart at the very edge of a narrow pavement on which the plaintiff was walking, so as to knock the plaintiff down) "was *prima facie* unjustifiable, and required an excuse to be shewn. When the motion in this case was first made, I had in my recollection the case of Wakeman vs. Robinson. It was there agreed that an *involuntary* act might be a defense on the general issue. The decision indeed turned on a different point; but the general proposition is laid down. I think the *omission to plead* the defense here deprived the defendant of the benefit of it, and entitled the plaintiff to recover."

But in truth neither case decides whether, where an act such as discharging a gun is voluntary, but the result injurious without negligence. an action of trespass can nevertheless be supported as against a plea pleaded and proved, and which the jury find established, to the effect that there was no negligence on the part of the defendant. The case of Underwood vs. Hewson, 1 Str. 596, decided in 1724, was relied on by the plaintiff. The report is very short: "The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him; and at the trial it was held that the plaintiff might maintain trespass—Strange *pro defendente.*" The marginal note in Nolan's Edition in 1795, not necessarily Strange's own composition, is this—"Trespass lies for an accidental hurt," and in that edition there is a reference to Buller's N. P., p. 16. On referring to Buller, p. 16, where he is dealing with Ward vs. Weaver, 14 Jac. 1, I find he writes as follows: "So (it was no battery) if one soldier hurts another in exercise; but if he plead, he must set forth the circumstances, so as to make it appear to the Court that it was inevitable, and that he committed no negligence to give occasion to the hurt, for it is not enough to say that he did it *casualiter, et per infortunium, et contra voluntatem suam,* for no man shall be excused of a trespass, unless it be justified entirely without his default: Weaver vs. Ward; and therefore, it has been holden that an action lay where the plaintiff standing by to see the defendant uncock his gun was accidentally wounded: Underwood vs. Hewson, Trinity, 10, Geo. 1, *per* Fortescue and Raymond in Midd., Str. 596." On referring back to Weaver vs. Ward, I can find nothing in that report to shew that the Court held, that in order to constitute a defense in the case of a trespass it is necessary to shew that the act was *inevitable.* If *inevitable,* it would seem that there was a defense under the general issue; but a distinction is drawn between an act which is inevitable and an act which is excusable, and what Weaver vs. Ward really lays down is that "No man shall be excused of a trespass except it may be judged utterly without his fault." Day vs. Edwards, 5 T. R. 648, 1794, merely decides that where a man negligently *drives* a cart against the plaintiff's carriage, the injury being committed by the *immediate act* complained of. the remedy must be trespass and not case.

But the case upon which most reliance was placed by the plaintiff's counsel was *Leame vs. Bray,* 3 East. 593. That was an action of trespass in which the plaintiff complained that the defendant with force and arms drove and struck a chaise which he was drivng on the highway against the plaintiff's curricle, which the plaintiff's servant was driving, by means whereof the servant was thrown out, and the horses ran away, and the plaintiff, who jumped out to save his life, was injured. The facts stated in the report include a statement that "the accident happened in a dark night, owing to the defendant's driving his carriage on the wrong side of the road, and the parties not being able to see each other; and that if the defendant had kept his right side there was ample room for the carriages to have passed without injury." The report goes on to state: "But it did not appear that blame was imputable to the defendant in any *other* respect as to the manner of his driving." It was therefore objected for the defendant, that the injury *having happened from negli-*

gence, and not wilfully, the proper remedy was by an action on the case, and not of trespass *vi et armis;* and the plaintiff was thereupon non-suited. On the argument of the rule to set aside the verdict the whole discussion turned upon the question whether the injury was, as put by LAWRENCE, J., at p. 596 of the report, immediate from the defendant's act, or consequential only from it, and in the result the non-suit was set aside. But it clearly appears from the report that there was evidence upon which the jury might have found negligence; and indeed the defendant's counsel assumed it in the very objection which prevailed with LORD ELLENBOROUGH when he non-suited the plaintiff. There is nothing in any of the judgments to shew that if in that case a plea had been pleaded denying any negligence, and the jury had found that the defendant was not guilty of any negligence, but (for instance) that the accident happened wholly through the darkness of the night, making it impossible to distinguish one side of the road from the other and without negligence on either side, the Court would have held that the defendant would have been liable either in trespass or in case.

All the cases to which I have referred were before the Court of Exchequer in 1875, in the case of Holmes vs. Mather, L. R. 10 Ex. 261, and BRAMWELL, B., in giving judgment in that case dealt with them thus: "As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: If the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy), where the act is wrongful either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the proper form of action if it were wrongful. This is the effect of the decisions."

This view of the older authorities is in accordance with a passage cited by MR. DICKENS from Bacon's Abridgement, Trespass, 1, p. 706, with a marginal reference to Weaver vs. Ward. In Bacon the word "inevitable" does not find a place. "If the circumstance which is specially pleaded in an action of trespass do not make the act complained of lawful" (by which I understand justifiable even if purposely done to the extent of purposely inflicting the injury, as for instance in a case of self-defense) "and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to shew not only that the act complained of was accidental" (by which I understand that the injury was unintentional), "but likewise that it was not owing to neglect or want of due caution." In the present case the plaintiff sued in respect of an injury owing to the defendant's negligence—there was no pretence for saying that it was intentional so far as any injury to the plaintiff was concerned—and the jury negatived such negligence. It was argued that nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, that was an injury owing to an act of force committed by the defendant, and therefore an action would lie. I am of opinion that this is not so, and that against any statement of claim which the plaintiff could suggest the defendant must succeed if he were to plead the facts sworn to by the witnesses for the defendant in this case, and

the jury believing those facts, as they must now be taken by me to have done, found the verdict which they have found as regards negligence. In other words, I am of opinion that, if the case is regarded as an action on the case for an injury by negligence, the plaintiff has failed to establish that which is the very gist of such action; if, on the other hand, it is turned into an action for trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action. I am, therefore, of opinion that I am bound to give judgment for the defendant.

Higginson vs. York, 5 Mass. 341 (1809).

Higginson owned an island, called Burnt Coat Island, upon which one Phinney, without the authority or knowledge of the owner, entered and cut into cordwood a quantity of the timber there growing. Phinney sold the wood, as it lay, to one Kenniston, a merchant upon the mainland; and Kenniston employed York, who was the master of a coasting vessel, to carry the wood to Boston. The defendant accordingly sailed to the island, and took the wood to Boston, where it was sold and the proceeds thereof accounted for to Kenniston. The defendant did not know, and apparently Kenniston did not know, of the trespass committed by Phinney, nor had either of them any reason to doubt Phinney's right to sell the wood.

Held, that York was liable in trespass to Higginson for the value of the wood.

Nonfeasance not Trespass.

Hartley vs. Moxham, 3 Q. B. 701 (1842).

Hartley, having for sometime lived as a lodger in Moxham's house, was about to remove therefrom, and had begun to pack up his belongings. A dispute arose as to the amount of Hartley's indebtedness for rent, whereupon Moxham locked up Hartley's room, with the goods of the latter in it, and declared that nothing should be removed until Hartley had paid what he owed. The goods were thus detained for a considerable time, to the substantial detriment of the plaintiff, who was obliged to forego a journey on business for the want of the articles locked up in Moxham's house. The action was trespass for seizing,

taking and carrying away Hartley's goods. On the facts appearing at the trial, the judge held that the defendant had not committed any trespass, inasmuch as he had not taken or otherwise disturbed the plaintiff's goods, but had only detained them. Accordingly, the plaintiff was non-suited, and this action was approved on motion for a new trial argued before the court *in banc.*

Trespass ab Initio.

Vaux vs. Newman, or The Six Carpenters' Case, 8 Coke, 146. King's Bench (1610).

This case is, perhaps, cited more frequently as the Six Carpenter's case than by the names of the parties.

The plaintiff kept what was in the pleadings described as "a common wine tavern, with a common sign at the door of the said house." On a certain day, *hora quarta post meridiem,* the defendants, six carpenters, turned into the said tavern and ordered some victual and drink. This was served to them, and this they consumed, and then they refused to pay for what they had received, and departed the house leaving the score unsettled. Vaux now sued the carpenters alleging that they had committed a trespass upon his property. He could not, of course, contend that the defendants were guilty of trespass in entering the house, for the tavern was a public place into which every one was, as a matter of legal right, entitled to go. But his theory was that, since the entry into the house was thus warranted by license of the law, the wrongful conduct of the carpenters whilst within the house was an abuse of that license, and that this misbehavior so related back to the original entry as to make them trespassers *ab initio.* The court held that, while the active misuse of a right given by law, such as the right to enter a tavern, will render the offender guilty of trespass by relation, yet mere nonfeasance, not being in the nature of a trespass, will not have that effect. And, as the misconduct of the carpenters was not the doing of something wrong but only the not doing of what was right, they were held not guilty of trespass.

And first, *it was resolved when entry, authority or license is given to anyone by the law, and he doth abuse it, he shall be a trespasser ab initio; but where an entry, authority or license is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser ab initio.*

And the reason of this difference is, that in case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo*, or to what intent he entered, for *acta exteriora indicant interiora secreta, Vide* 11 H. 4, 75 b. But when the party gives an authority or license himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or license, and therefore the law gives authority to enter into a common inn or tavern: so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle; and such like. * * * But if he who enters into the inn or tavern doth a trespass, as if he carries away anything; or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the distress; or if he who enters to see waste break the house or stays there all night; or if the commoner cuts down a tree; in these and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be a trespasser *ab initio*, as it appears in all the said books. So if a purveyor takes my cattle by force of a commission, for the King's house, it is lawful; but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. 6, 19 b. *Et sic de similibus.*

Second: *It was resolved per totam curiam, that not doing cannot make the party, who has authority or license by the law, a trespasser ab initio, because not doing is no trespass*, and therefore if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, etc., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio;* and therewith agrees 33 H. 6, 47 a. So if a man take cattle damage-feasant, and the other offer sufficient amends, and he refuses to re-deliver them, now if he sues a replevin, he shall recover, Lit. Rep. 34, Hetl. 16, damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69 g. temp, E. 1. Replevin, 27. 27 E. 3, 88. So in the case at bar, for not paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio;* and therewith agrees directly in point, 1 Sid. 5; 12 E. 4, 9, a, b.

Dumont vs. Smith, 4 Denio, 319, New York (1847).

Smith, an attorney, having received for collection a promissory note signed by Dumont, wrote to the latter requesting him to call at Smith's office and pay the amount due. Dumont accordingly went to the office, said he had come to pay the note, which was shown to him, and afterwards, a dispute arising as

to the sum due, tore his name from the paper. He was then ordered to leave the office, but refused to do so at once. After sometime he left, taking the note with him, and daring Smith to come outside and undergo corporal chastisement.

Smith sued Dumont in trespass, and persuaded the trial court to hold that the defendant's conduct whilst in the office made him a trespasser *ab initio*. The Supreme Court of the State overruled this holding and, on account of the error in this respect, reversed the judgment which the plaintiff had obtained below. In so doing the court took occasion to correct an erroneous decision on the subject rendered in an earlier case.

JEWETT, J.: The case of Adams vs. Freeman, 12 Johns, 408, arose in a justice's court. It was an action of trespass for entering the plaintiff's dwelling house, and not guilty was pleaded. The evidence was that the defendant entered the dwelling house of the plaintiff without permission. On being requested to leave the house, he answered he would go when he pleased; and, being several times ordered to go out, he gave the same answer, and remained half an hour afterwards, and finally left. The justice non-suited the plaintiff. On *certiorari* this court reversed the judgment, holding that entering a dwelling house of another, it not being an inn or tavern, without license was in law a trespass, and that, to render such an entry lawful, there must be a permission, express or implied. There being no permission in that case, the act of entering the plaintiff's house was held to be a trespass. But the court added: "If the defendant had received permission to enter, as by being asked to walk in upon his knocking at the door, his subsequent conduct was such an abuse of the license as to render him a trespasser *ab initio*." This remark was extra-judicial, and is not supported by principle, and besides has been virtually overruled by the cases of Van Brunt vs. Schenck (13 Johns, 414) and Allen vs. Crofoot (5 Wend. 506) before referred to.

In this case the defendant showed an invitation or license given him by the plaintiff himself, and therefore was clearly not liable as a trespasser for the entry on account of any subsequent acts, however tortious. If liable at all in trespass, it must be only in respect to the subsequent acts, as only those under any circumstances will amount to trespasses.

West vs. Nibbs, 4 C. B. 172. Common Pleas (1847).

Nibbs having demised certain premises to West, the latter allowed the rent to become in arrear, whereupon Nibbs seized divers goods of West on the land by way of distress, and impounded them in accordance with the law applicable to such a case. West tendered the amount of the rent due, which Nibbs accepted. West thereupon demanded that Nibbs return the dis-

trained goods; but this Nibbs refused to do and, instead, sold the property. West brought this action of trespass *de bonis asportatis,* alleging that the defendant had with force and arms seized, taken and carried away the plaintiff's goods. Nibbs set forth his title to the land as assignee of a leasehold estate, which he deraigned from the last seisin in fee through six transfers, alleged his demise to West for a term, the default of the latter in payment of the rent, and his own seizure and impounding of the goods, which he thus justified as a lawful distraint. The plaintiff replied, by way of new assignment,* that he sued, not for the seizing and impounding, but for that, after the goods were impounded and the rent paid by him and accepted by the defendant. Nibbs had retained possession of the goods and had sold them. The facts thus alleged being admitted by a demurrer to the replication, the question presented was whether the defendant, whose original act in seizing the goods was conceded to be lawful, had become a trespasser *ab initio* by his subsequent unlawful detention and sale of the articles distrained. The plaintiff contended that the landlord's conduct after the payment of the rent was such an abuse of the authority given by law as made his whole conduct a trespass by relation. *Held,* that the defendant's behavior after his acceptance of the rent, though unlawful and tortious, was mere nonfeasance, and therefore not capable of relating as a trespass.

WILDE, C. J.: I feel considerable difficulty in coming to the conclusion that a mere non-feasance can be the subject of an action of trespass. * * * My present impression certainly is that trespass will not lie for the mere retention of the goods; the goods being in the custody of the law, the distrainor is under no legal obligation actively to re-deliver them; the owner must take due means to re-possess himself of them. There is little difficulty as to the substantial justice of the case. That trover or

*V. WILLIAMS, J.: It must be borne in mind that the proper office of a new assignment is to explain that which is ambiguous on the face of the declaration. Here the declaration charges a joint trespass by Nibbs and Windley in seizing and disposing of the plaintiff's goods. Windley pleads not guilty only. Nibbs, in effect, says:

"I suppose the trespass you, the plaintiff, mean to charge me with is, that I took your goods as a distress for rent; and that I justify."

The plaintiff, by his new assignment, replies:

"That is not the trespass I mean, but a totally different one, namely, that you, Nibbs, retained the goods and sold them, after I had satisfied the arrears of rent and the expenses of the distress."

detinue would lie, there is no doubt; the only question for us to consider is whether trespass will lie. In Vertue vs. Beasley, 1 M. & Rob. 21, a tender of the rent and costs had been made after the distress, but before the goods were impounded or removed, the landlord refused to accept it, and afterwards removed the goods; and PARKE, J., ruled that trespass was maintainable for such removal. "If," says the learned judge, "the injury had arisen from the mere neglect to do some act"—which perhaps may be read, the mere omission to restore the goods after acceptance of the rent—"case would have been the only proper remedy."

CRESWELL, J.: The new assignment alleges that the payment and acceptance of the rent in arrear took place after the distress, but it does not aver that it took place before the impounding of the goods distrained; and we think that it must, therefore, be considered to have taken place afterwards. The question, then, is, whether, if a landlord, after a lawful distress and impounding, accepts the rent in arrear and the charges of the distress, he is liable as a trespasser for merely retaining possession of the goods distrained and selling and disposing of them. As to the selling and disposing of them, although, under certain circumstances, the assuming a right to dispose of the goods of another may amount to a conversion of them sufficient to sustain an action of trover, yet it seems to us impossible to maintain that a man becomes a trespasser by the mere act of selling and disposing of the goods of another without authority, unless such sale and disposition be accompanied by some act of removal of the goods, either by the vendor or by the vendee.

It remains, therefore, to consider only whether the merely retaining possession of the goods as alleged amounts to an act of trespass. In the Six Carpenters' Case, 8 Co. Rep. 146, b, it was resolved *per totam curiam* "that not doing can not make a party a trespasser *ab initio*, because not doing is no trespass; and, therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, etc., and requires his beasts again, and he will not re-deliver them, this not-doing cannot make him a trespasser *ab initio*." If, then, a landlord who refuses a proper tender is not to be regarded as a trespasser merely by reason of his non-feasance in failing to deliver up the distress, he being required to do so, it appears to us to follow that a landlord who has accepted the rent in arrears, etc., after the impounding, cannot be treated as a trespasser merely because he retains possession of the goods distrained—although his refusal to deliver them up to the tenant may amount to a conversion sufficient to make the landlord liable in an action of trover.

The case of Evans vs. Elliott, 5 Ad. & E. 142, 6 N. & M. 606, was relied on in argument by the counsel for the plaintiff. But, although that case is authority for the proposition, that, where there has been a tender between the taking and the impounding, a detention after the tender is sufficient to satisfy the usual allegation in a declaration in *replevin*, that the defendant took, etc., and detained, etc., yet we do not consider that case as deciding that the mere retaining by the landlord of the goods distrained, after the tenant has gained a right to have them delivered up to him, will render the landlord liable to an action of trespass.

Nor do we consider our present decision as conflicting with the case of Vertue vs. Beasley, 1 M. & Rob. 21. There, a tender of the rent and costs had been made after the distress, but before the goods were impounded or removed; the landlord refused to accept it, and afterwards removed the goods; and it was held by PARKE, J., that he was liable to the tenant in trespass for such removal. In that case the cause of action was not the mere retaining possession, but the wrongful removal of the goods after the tender. On the whole, we think the demurrer sustainable on the ground that the new assignment does not sufficiently allege any act of trespass.

Judgment for the defendant.

Shorland vs. Govett, 5 B. & C. 485. King's Bench (1826).

The defendant, a deputy sheriff, was given a writ of *fieri facias* running against the plaintiff. In the execution of this writ Govett entered the house of Shorland, levied upon the goods of the latter, and demanded for the release of the goods a sum larger than that stated in the writ as the amount to be made. Shorland paid the sum demanded, and then sued the deputy sheriff in trespass, alleging the extortion of an excessive amount by means of the execution. It was conceded that the defendant's entry and seizure were lawful; but the plaintiff's theory was that the demand of more than was due constituted an abuse of the defendant's legal authority and made him a trespasser *ab initio*. *Held*, that the exaction of an excessive amount was not in its nature an act of trespass, and therefore could not relate back to the original entry and convert that into a trespass.

BAYLEY, J.: Where the subsequent act is a trespass, the law assumes that the party did not enter for the purpose alleged in the plea, but for the purpose of committing the trespass. But here the subsequent act was not a trespass, nor can it be reasonably supposed that the original entry was for the purpose of extortion.

HOLROYD, J.: If the allegations contained in this replication were sufficient to make the defendant a trespasser *ab initio*, the consequences to him would be very serious, for he would be liable in damages to the extent of the whole sum levied, and not merely the surplus exacted illegally. He is still liable for the extortion, although not for the sum which he was authorized to levy. * * * This replication does not show that the defendant held the goods longer than he was entitled so to do, but that he took £3 10s. more than he was authorized to levy. The whole money was paid at once, and, until a part was paid, the bailiff had a right to keep possession. It is not averred that the smaller sum was tendered and refused; and perhaps even that, according to the doctrine in 8 Co. 146, might not have been sufficient.

LITTLEDALE, J.: If the defendant were a trespasser *ab initio*, there can be no doubt that the plaintiff would be entitled to recover the whole sum levied, just as if no justification at all had been pleaded. * * * It is contended, however, that such is the law according to the Six Carpenters'

Case. Whether there is much good sense in that case it is unnecessary to say; for the decision of the present case it suffices to say that, in every instance put by LORD COKE, there was a subsequent act of trespass, which made the party liable to be treated as a trespasser *ab initio*. Dye vs. Leatherdale, 3 Wilson, 20, and Taylor vs. Cole, 3 T. R. 292, confirm LORD COKE'S view of the case. Here no act of trespass subsequent to the entry and levy is shown; the replication alleges the extortion to have been before the writ was fully executed. There are many statutes against extortion, but in none of them is it said that the party guilty of it is a trespasser.

Allen vs. Crofoot, 5 Wendell, 506. New York (1830).

Allen, intending to bring a suit against Crofoot, desired to obtain copies of certain documents which the latter had in his house. To this house Allen went, at a time when he knew Crofoot was not at home, only Mrs. Crofoot and her brother being there. As Allen had been on friendly terms with the family and in the habit of visiting them, he had no difficulty in obtaining entrance to the house, and readily persuaded Mrs. Crofoot to produce the papers desired; and these he copied, which accomplishment, as he admitted, would have been impossible but for the deception that he practiced.

Crofoot brought an action of trespass against Allen, upon the theory that the fraud used by the latter in getting into the house vitiated the license to enter given by Mrs. Crofoot; or that, if his entry was lawful, he became a trespasser *ab initio* when he abused his license by copying the papers.

Held, that the conduct of the defendant did not, upon either theory, amount to a trespass.

SAVAGE, C. J.: It was decided in the Six Carpenters' Case, 4 Co. 290, that, where an authority to enter upon the premises of another is given by law, and is subsequently abused, the party becomes a trespasser *ab initio;* but where such authority or license is given by the party, and it is subsequently abused, the party guilty of the abuse may be punished, but he is not a trespasser; and the reason of the difference is said to be that, in case of a license given by law, the subsequent tortious act shows *quo animo* he entered; and, having entered with an intent to abuse the authority given by law, the entry is unlawful; but where the authority or license is given by the party, he cannot punish for that which was done by his own authority. Whether this is not a distinction without a difference of principle, it is unnecessary to inquire. A better reason is given for it in Bacon's Abridgment, title Trespass, B. Where the law has given authority, it is reasonable that it should make void everything done by the abuse of that authority, and leave the abuser as if he had done everything without authority. But where a man who was under no necessity to give an authority does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse, because it was the man's folly to trust another with an authority who was not to be trusted therewith. * * *

It has been decided that to enter a dwelling house without license is in law a trespass: 12 Johns, 408; and that possession of property obtained fraudulently confers no title. Under such circumstances no change of property takes place: 15 Johns, 186; and it is argued that, as fraud vitiates everything which it enters, a license to enter the house, fraudulently obtained, is void, and is no license. The principle of relation has never been applied to such a case, nor is it necessary for the purposes of justice to extend it farther than to cases where the person enters under a license given him by law. In such cases as the party injured had not the power to prevent the injury, it seems reasonable that he should be restored to all his remedies.

Execution of Process.

Semayne's Case (Semayne vs. Gresham), 5 Coke, 91. King's Bench (1604).

Mr. Shirley, in his Leading Cases on the Common Law, p. 325, thus states the facts of this case:

Berisford and Gresham were two young sports of the sixteenth century. They were great chums, and lived together in a house of which they were joint tenants, in the suburb of Blackfriars. Berisford, as is the manner of gilded youth, plunged deeply into debt, and one of the largest and most pressing of his creditors was a Mr. Semayne, to whom he "acknowledged a recognizance in the nature of a statute staple." In these impecunious circumstances he was lucky enough to die, and, by right of survivorship, the ownership of the house in Blackfriars became vested in the bereaved Gresham. Now, in that house were "divers goods" of the late Mr. Berisford, and to these, in virtue of the little formality of the statute staple, Semayne not unreasonably considered himself entitled. Accordingly, he gave instructions to the sheriffs of London to go and do the best they could for him, and those functionaries, armed with the proper writ, set off for Blackfriars. But, when they came to the house, Gresham, who had an inkling of what they had come for, shut the door in their faces, "whereby they could not come and extend the said goods." It was for thus "disturbing the execution," and causing him to lose the benefit of his writ, that Semayne brought this action. Much, however, to his surprise and disgust, he did not succeed, for the judges said Gresham had done nothing wrong in locking the front door,

and that, even when the king is a party, the householder must be requested to open the door before the sheriff can break his way in.

And in this case these points were resolved:— 1. *That the house of everyone is to him as his castle and fortress as well for his defense against injury and violence, as for his repose;* and although the life of a man is a thing precious and favored in law; so that although a man kills another in his defence, or kills one *per infortun'*, without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels [not so now: 24 and 25 Vict. c. 100, s. 7; 33 and 34 Vict. c. 23], for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing. * * * *It was resolved, when any house is recovered by any real action, or by eject' firmae, the sheriff may break the house and deliver the seisin or possession to the demandant or plaintiff*, for the words of the writ are, *habere facias seisinam* or *possessionem*, etc., and, after judgment, it is not the house, in right and judgment of law, of the tenant or defendant. . . . *In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors.* * * *In all cases where the door is open*, 1 Brown, 50; Cro. Jac. 486, *the sheriff may enter the house, and do execution, at the suit of any subject, either of the body or of the goods; and so may the lord in such case enter into the house*, Br. Trespass, 226; Br. Issue, 26; *and distrain for his rent or service.* * * *But the great question in this case was, if by force of a capias or fieri facias at the suit of the party the sheriff, after request made to open the door, and denial made, might break the defendant's house to do execution, if the door be not opened.* * * *But it was resolved, that it is not lawful for the sheriff (on request made and denied) at the suit of a common person* [1 Jones, 420, 430; 1 Brownl. 50; Cr. Car. 537; Cr. El. 908; 4 Leon. 41; 11 Co. 82], *to break the defendant's house, sc. to execute any process at the suit of any subject;* for thence would follow great inconvenience, that men, as well in the night as in day, should have their houses (which are their castles) broke, by color whereof great damage and mischief might ensue; for by color thereof, on any feigned suit, the house of any man, at any time, might be broke when the defendant might be arrested elsewhere, and so men would not be in safety or quiet in their own houses. * * *

In 18 E. 4, 4, a, by Littleton and all his companions it is resolved that the sheriff cannot break the defendant's house by force of a *fieri facias*, but he is a trespasser by the breaking; and yet the execution which he then doth in the house is good. * * *

It was resolved that the house of any one is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house; 7 Cr. Car. 544; *or the goods of any other which are brought*

and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore in such cases, after denial or request made, the plaintiff may break the house.

Ilsley vs. Nichols, 12 Pickering, 270. Massachusetts (1831).

The plaintiff, having become insolvent, shut himself up in his dwelling house with his goods, intending to dispose of them among his creditors as he should think just. One of those creditors sued out a writ of attachment, which was given for service to Nichols, a deputy sheriff. Nichols, with certain other persons as assistants, broke the outer door of Ilsley's house, against his prohibition, levied the attachment upon some of the plaintiff's goods, and took them away. Ilsley now sued the deputy sheriff and his assistants in trespass *quare clausum fregit,* the declaration alleging not only the breaking of the plaintiff's house but the taking of his goods, on both of which accounts damages were claimed. It was agreed that he was entitled to recover for the unlawful entry, but it was insisted on behalf of the defendant that, although the breaking of the house was unlawful, yet the attachment made by means thereof was nevertheless valid.

Held, that the attachment was invalid by reason of the illegal means by which it was effected, and that the plaintiff was entitled to recover the value of his goods attached.

SHAW, C. J.: No question is made of the plaintiff's right to recover; but the question turns upon the amount of damages. * * * The circumstances to be taken into consideration are that—the goods were in a dwelling-house, and were attached in consequence of the house being broken open by forcing the outer door; that the direct and avowed purpose of breaking open the house was to make an attachment and that this was done against the will and contrary to the express prohibition of the owner. * * * The goods were attached in pursuance of a previous design, and through the medium of this unlawful act, and could not have been otherwise attached; and the question is, whether the attachment was valid, and constituted a legal lien on the goods.

Were it not for some very respectable authorities having a different aspect, it would seem from the mere statement of the question, that it must be decided in the negative.

In Bacon's Abridgment, it is stated, that on a *capias*, or *fieri facias*, the sheriff is not authorized to break the door of a dwelling-house, *though the execution would be good.* Bac. Abr. Sheriff, N. 3. In 18 E. 4, f. 4, which is usually cited as the foundation of the supposed rule, we thing it quite manifest, that the real point decided there was, that a sheriff is not justified in breaking a dwelling-house in order to execute a *fieri facias*, for a *fieri facias* will not excuse an officer for breaking a dwelling-house.

LORD COKE, in his report of Semayne's Case, 5 Rep. 93, in referring to the same case, says it was resolved by Littleton and all his companions. "that the sheriff cannot break the defendant's house by force of a *fieri facias*, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good." This point was not raised or decided in Semayne's Case. * * *

From a review of the cases it seems never to have been judicially determined, that an attachment on *mesne process* or *fieri facias*, where the possession is obtained by unlawful means, would be valid and effectual to give the sheriff and the creditors a legal right to hold the property. But on the other hand, there are many cases, quite analogous in principle, which seem strongly to support the contrary position.

There are many cases where arrests on civil process are held to be unlawful and void in consequence of the unlawful means used to place the party in a situation to be arrested, or where he has been unlawfully detained until he could be lawfully arrested, or other unlawful means used to obtain the custody of his person.

These authorites go directly to support the broad position laid down by LORD HOLT, who, after stating that if a man is wrongfully brought into a jurisdiction and there lawfully arrested, he ought to be discharged, adds, "for no lawful thing, founded upon a wrongful act, can be supported," Luttin vs. Benin, 11 Mod. 50; also *ex parte Wilson*, 1 Atk. 152, and Yeates vs. Delamayne, 17 Geo. 3, Exchequer.

These cases seem to establish the general principle, that a valid and lawful act cannot be accomplished by an unlawful means; and whenever such unlawful means are resorted to, the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by those unlawful means to his rights.

An officer, having a valid writ, if he does not pursue the authority given him by his writ, and the rules of law in the execution of his duty under it, is a trespasser, in the same manner as if he had no writ. * * * This proceeds on the ground that the writ affords him a definite and limited authority only, regulated by law; and the legal justification of his acts is co-extensive with his legal authority, and he has no protection when acting beyond the scope of that authority. * * * The rule is well established, that where an authority given by law is exceeded, the party loses the benefit of his justification, and the law holds him a trespasser *ab initio*, although to a certain extent he follows the authority given. The law will operate retrospectively to defeat all acts, thus done under color or lawful authority, when exceeded; and *a fortiori* will it operate

prospectively to prevent the acquisition of any lawful right, by the excess and abuse of an authority given for useful and beneficial purposes.

As it is a well-settled rule of law, established upon considerations of policy, that the doors of a dwelling-house cannot lawfully be forced, for the service of civil process, we think it follows, as a necessary legal consequence, that no valid attachment can be thereby made.

Wise vs. Withers, 3 Cranch, 331. Supreme Court of the United States (1806).

An Act of Congress required all able-bodied male persons within certain ages in the District of Columbia to be enrolled as members of the militia and to perform certain military services. The statute provided also for the creation of a court martial which should have jurisdiction to assess and collect fines against persons liable to militia service who should fail to perform the prescribed military duty. From the requirements of this statute, however, were excepted "the officers, judicial and executive of the United States." Wise was a justice of the peace for the District of Columbia, and conceived that he was an officer, either judicial or executive, of the United States. He, therefore, omitted to report for military duty when required by the officers of the militia. This delinquency being reported to the court martial having jurisdiction in cases of default under the statute, that court undertook to try him as for a violation of the act, held that he was not an officer of the United States but was liable to militia duty, found him guilty of delinquency, and assessed a fine against him. Process for the collection of this fine was delivered to Withers, who was an officer of the militia charged with the duty of collecting such fines. Acting in virtue of this writ, Withers seized certain goods of Wise in satisfaction of the fine. Wise brought this action of trespass against Withers. The defendant pleaded the facts, justifying as a collector of fines under the judgment of the court martial and the writ issued thereupon. The plaintiff replied that he was a justice of the peace for the District of Columbia. To this replication the plaintiff demurred, whereby was raised the question, whether, admitting that the plaintiff was such justice, he was on that account exempt from the jurisdiction of the court martial. *Held,* that the plaintiff was an officer of the United States and

for that reason not liable to militia duty or subject to the jurisdiction of the court martial; and also that, the proceedings of the court martial being void for want of jurisdiction over Wise, the collector, in enforcing the judgment of that court, was a trespasser. The plaintiff, therefore, had judgment.

MARSHALL, C. J.: It follows from this opinion that a court-martial has no jurisdiction over a justice of the peace, as a militia-man; he could never be legally enrolled; and it is a principle that a decision of such a tribunal in a case clearly without its jurisdiction cannot protect the officer who executes it. The court and the officer are all trespassers.

Leave and License.

Wood vs. Leadbitter, 13 M. & W. 838. Exchequer (1845).

The plaintiff sued in trespass for assault and false imprisonment. The plea was that, at the time of the said supposed trespass the plaintiff was in a certain close of the Earl of Eglintoun; that the defendant, being the servant of Lord Eglintoun, and by his command, gently laid his hands upon the plaintiff in order to remove him from the said close, using no unnecessary violence in so doing; which is the same supposed trespass in the declaration mentioned. The plaintiff replied that, at the time of the said removal, he was in the said close by the leave and license of LORD EGLINTOUN. The defendant rejoined that the plaintiff was not in the said close by the leave and license of LORD EGLINTOUN; and on this issue was joined.

At the trial it appeared that in 1843 LORD EGLINTOUN was the steward of the Doncaster Races, and that in that capacity he had possession and control of the enclosed grounds used for the races. By his authority tickets were sold, at the price of a guinea, each ticket entitling the holder to be admitted to the grounds at all times through the duration of the races. The plaintiff bought one of these tickets and was admitted to the grounds. "In consequence of some alleged malpractices of his on a former occasion connected with the turf," Wood was considered an undesirable patron of the races; and LORD EGLINTOUN directed Leadbitter, a police officer, to order him from the grounds. Wood refused to go; whereupon the defendant, by the order of LORD EGLINTOUN, took him by the arm and forced

him out of the enclosure, using no more violence than was necessary to effect the ejection.

The judge presiding at the trial ruled that it was lawful for LORD EGLINTOUN to remove the plaintiff from the enclosure, which upon the pleadings was admitted to be the Earl's property, and that this might lawfully be done without assigning any reason for it and without returning the money paid by the plaintiff for his ticket. It became, therefore, unnecessary to go into the question, whether or not the plaintiff had been guilty of the malpractices alleged against him. The jury were told that, if Wood had been required to leave the grounds and had failed to do so voluntarily within a reasonable time for getting out, then he no longer had the leave and license of LORD EGLINTOUN to be there, and that the ejection was justified. The verdict, accordingly, was for the defendant.

Held, on motion for new trial, that the direction was correct, and that the sale of a ticket to a place of amusement creates only a license to enter the place, which license is revocable at any time.

ALDERSON, B.: That no incorporeal inheritance affecting land can either be created or transferred otherwise than by deed, is a proposition so well established that it would be pedantry to cite authorities in its support. All such inheritances are said emphatically to lie in *grant*, and not in livery, and to pass by mere delivering of the *deed*. In all the authorities and text-books on the subject, a *deed* is always stated or assumed to be indispensably requisite: * * * Now, in the present case, the right claimed by the plaintiff is a right, during a portion of each day, for a limited number of days, to pass into and through, and to remain in, a certain close belonging to Lord Eglintoun; to go and remain where, if he went and remained, he would, but for the ticket, be a trespasser. This is a right affecting land at least as obviously and extensively as a right of way over the land—it is a right of way and something more; and if we had to decide this case on general principles only, and independently of authority, it would appear to us perfectly clear that no such right can be created otherwise than by deed.

. . .

It was suggested that, in the present case, a distinction might exist by reason of the plaintiff's having paid a valuable consideration for the privilege of going on the stand. But this fact makes no difference; whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed; any such action would be founded on a breach of contract, and would not be the

result of his having acquired by the ticket a right of going upon the stand in spite of the owner of the soil.

Marrone vs. Washington Jockey Club, 35 App. D. C. 82. Affirmed, 227 U. S. 633 (1913).

Marrone purchased a ticket of admission to the grounds of the Jockey Club at Bennings. He was charged with having drugged a horse of his which had been entered in some former race; and on this account, when he attended the races on the aforesaid ticket, he was requested to leave the grounds, and, on his refusing to do so, he was ejected. He sued the Club in an action of tort, and at the trial a verdict against him was directed. This action was approved by the Court of Appeals and again by the Supreme Court. In the latter tribunal it was said by:

HOLMES, J.: As no evidence of conspiracy was adduced, and as no more force was used than was necessary to prevent the plaintiff from entering upon the race track, the argument hardly went beyond an attempt to overthrow the rule commonly accepted in this country from the English cases and adopted below, that such tickets do not create a right *in rem;* 35 App. D. C. 82; Wood vs. Leadbitter, 13 M. & W. 838; McCrea vs. Marsh, 12 Gray, 211; Johnson vs. Wilkinson, 139 Mass. 3; Horney vs. Nixon, 213 Pa. St. 30; Meisner vs. Detroit, etc., Ferry Co., 154 Mich. 545; W. W. V. Co. vs. Black, 75 S. E. Rep. 32; Shubert vs. Nixon Amusement Co., 83 Atl. Rep. 369; Taylor vs. Cohn, 47 Oregon, 538; People vs. Flynn, 114 App. Div. 578, 189 N. Y. 180.

We see no reason for declining to follow the commonly accepted rule. The fact that the purchase of the ticket made a contract is not enough. A contract binds the person of the maker, but does not create an interest in the property that it may concern, unless it operates also as a conveyance. The ticket was not a conveyance of an interest in the race track, not only because it was not under seal, but because by common understanding it did not purport to have that effect. There would be obvious inconveniences if it were construed otherwise. But if it did create such an interest, that is to say, a right *in rem* valid against the landowner and third persons, the holder had no right to enforce specific performance by self-help. His only right was to sue on the contract for its breach. It is true that, if the contract were incidental to a right of property, either in the land or in goods upon the land, there might be an irrevocable right of entry; but when the contract stands by itself, it must be either a conveyance or a license subject to be revoked.

Mesne Profits.

Case vs. Shepherd, 2 Johnson's Cases, 27. New York (1800).

The defendant was a justice of the peace, and the plaintiff was charged before him with the offence of forcible entry and

detainer, the complainant being one Bull, who alleged that Case was in unlawful occupation of a farm claimed by Bull. Before the cause came on for a trial, Case obtained from a higher court a writ of *certiorari,* by which the cause was transferred to that court and the jurisdiction of the justice was terminated. Notwithstanding this, Shepherd proceeded to try the issue, found Case guilty, and issued a warrant of restitution, whereby Case was turned out and Bull was put into possession of the land. Bull was still in possession when the present suit was brought, and had remained long enough to reap and convert to his own use divers crops which had been growing on the land when Case was dispossessed.

As the justice had acted in the matter after his jurisdiction had ceased, he was guilty of trespass in causing Case to be dispossessed, and was as—seems to have been conceded and was positively held in this cause—liable to Case for any damages which the latter was entitled to recover on account of his ouster from the premises. Case brought the present action in trespass against Shepherd, and, at the trial, was allowed to prove by way of showing damages, not only that he had been ejected from the land, but also the value of the crops thereafter appropriated by Bull; and he obtained, in the lower court, a verdict for an amount sufficient to compensate his total loss. This verdict was vacated because of the admission of evidence as to the value of the crops; and it was held that the plaintiff, being still out of possession, was entitled to damages only for the initial trespass, that is, the expulsion from the land, and that he could not claim the value of the crops—*mesne profits*—until he should have repossessed himself of the premises.

PER CURIAM: In this case the trespass is laid with a *continuando;* but the distinction as to the amount of damages to be recovered in this action is this: after an ouster, you can recover only for the simple trespass on the first entry; for though, where there is an ouster, every subsequent act is a continuance of the trespass, yet, in order to entitle the plaintiff to recover for the subsequent acts, there must be a re-entry. But, after a re-entry, he may lay his action with a *continuando* and recover mesne profits as well as damages for the ouster. The present suit was commenced before any re-entry by the plaintiff; he is, therefore, entitled to recover damages for the *first* entry only, or single trespass, and not for the crops.

CONVERSION.

Conversion is defined to be "An unauthorized assumption and exercise of the right of ownership over goods of another, to the alteration of their condition or the exclusion of the owner's rights": Bouvier, Law Dictionary.

"The exercise of dominion or the usurpation of ownership over the chattels of another": Bigelow on Torts.

"What is a conversion but an assuming upon one's self the property and right of disposing of another's goods": Lord Holt, in Baldwin vs. Cole, 6 Mod. 212; *infra,* p. 319.

"An unauthorized act which deprives another of his goods permanently or for an indefinite time": Bramwell, B., in Hiort vs. Bott, L. R. 9 Exch. 86.

Whether all or any of these definitions are consistent with all of the decisions may be doubted. The courts seem to have a fairly definite conception of conversion but to have found difficulty in putting that conception into words which shall accord with every concrete instance of conversion. Baron Bramwell, in Burroughes vs. Bayne, *infra,* says: "It seems to me that, after all, no one can undertake to define what a conversion is. Some decided cases may enable one to come to a conclusion, but in cases not similar there will always be difficulty."

By comparing the definitions above quoted, we may observe that the conception intended to be expressed includes the unauthorized assumption of a right to exercise dominion over the goods of another to the exclusion of the owner's right over the goods, which assumption amounts to an usurpation of ownership and deprives the owner of his property.

The idea pervading these definitions is, manifestly, that of appropriation. Conversion is, essentially, the wrongful appropriation of another's goods, as trespass is the wrongful disturbance of another's possession.

What Constitutes Conversion.

To constitute conversion, therefore, there must be some appropriation of the goods, such an application of them to one's own

use as implies an assertion of ownership or of a right to use them against the will of the owner, or such a disposal of the goods as amounts to the exercise of a dominion which could be warranted only by the right of ownership. Thus, to sell the goods of another is plainly the assertion of a right properly belonging only to the owner; to use the property of another without his permission is to usurp a privilege of ownership; to prevent another from doing what he would with his own possessions is to exercise a dominion which overrides the right of proprietorship. On the other hand, acts amounting to trespass or some other wrong may be committed upon the goods of another which do not import any assumption of ownership or any other purpose that is inconsistent with the owner's continuing title and rights as owner. Thus, the mere meddling with the goods of some one else, or the removal of them, or even the intentional doing of damage to them, there being no intention on the part of the wrongdoer to appropriate the goods or to make any use of them, will not be a conversion:

Bushel vs. Miller, *infra,* p. 308;
Fouldes vs. Willoughby, *infra,* p. 309.

And the receipt or use of goods in subservience to an unknown owner's title, and with no assertion of interest adverse to that title, though it may amount to a trespass, will not constitute a conversion:

Loring vs. Mulcahy, *infra,* p. 314;
Frome vs. Dennis, *infra,* p. 314.

The simple injuring or destruction of a chattel is not a conversion; as where one cut a tree upon the land of another and left it lying as it fell:

Mires vs. Solebay, 2 Mod. 242.

But if the trespasser had carried off the tree and made some use of it, that would have been a conversion. So, if an article be destroyed with no other purpose than to do mischief—as where a window-pane is broken—there is no conversion; as also,

where an article was injured and left to be carried away by the tide, but there was no appropriation of it to any purpose:

Simmons vs. Lillystone, *infra,* p. 313.

Where, however, the destruction is done for the sake of subserving some ulterior purpose which is, or is conceived to be, beneficial to the wrongdoer, or where the act of destroying amounts to a misusing of the article—as where a paper is destroyed by putting it into water—the act is a conversion:

Mulgrave vs. Ogden, *infra,* p. 315.

Or where a promissory note belonging to another is cancelled or destroyed for the purpose of making it unavailable:

Thomson vs. Gortner, 73 Md. 478.

And it has been said that even the malicious destruction of property, if done with the intent to deprive the owner of it, will be a conversion:

Fouldes vs. Willoughby, *infra,* p. 309.

Conversion may be committed also by the mere unlawful detention of another's goods, although they have come rightfully into one's possession. To retain property against the demand of one claiming it is in effect a denial of the demandant's title to the property, or at least the assertion of a dominion paramount to his rights as owner. Therefore, the bare refusal to surrender goods upon demand of their owner is, on its face, a conversion of them, provided, of course, the goods are at the time in the possession or subject to the control of the person upon whom demand is made:

Baldwin vs. Cole, *infra,* p. 319;
Wilton vs. Girdlestone, *infra,* p. 319;
Burroughes vs. Bayne, *infra,* p. 320.

But mere negligence in keeping or managing goods, though it result in the loss or destruction of them, is not conversion:

Mulgrave vs. Ogden, *infra,* p. 315;
Heald vs. Carey, *infra,* p. 323;
Williams vs. Gesse, *infra,* p. 324.

Modes of Conversion.

Conversion may be committed, therefore, in several modes, as,

1. By wrongfully taking the goods of another with intent to appropriate them; and the goods may be taken either directly from the possession of the owner, or from one who has gotten the possession from him, whether lawfully or unlawfully:

McCombie vs. Davies, *infra,* p. 302;
Hoffman vs. Carow, *infra,* p. 296.

2. By unlawfully detaining goods:

Beasley vs. Railroad Co., *infra,* p. 304.

3. By unlawfully selling, pledging, delivering or otherwise disposing of goods:

Hoffman vs. Carow, *infra,* p. 296;
Syeds vs. Hay, *infra,* p. 301;
Youl vs. Harbottle, *infra,* p. 302;
Parker vs. Godin, *infra,* p. 296.

4. By wrongfully using goods; as where one hires a horse to ride to a certain place and rides to another; or where one having goods on bailment consumes them or otherwise uses them:

Philpott vs. Kelley, *infra,* p. 306;
Lord Petre vs. Heneage, *infra,* p. 293.

5. By wrongfully asserting dominion or exercising authority over goods:

Bristol vs. Burt, *infra,* p. 293;
Reynolds vs. Shuler, *infra,* p. 294;
Skipwick vs. Blanchard, *infra,* p. 312.

6. By wrongfully destroying goods for the purpose of depriving the owner of their use.

7. By wrongfully changing the character of goods or intermingling them with other goods so as to destroy or obscure their

identity; as by mixing water with wine, or the goods of one person with those of another.

Richardson vs. Atkinson, *infra,* p. 306;
The Idaho, *infra,* p. 330.

So it is a conversion to make another person's grapes into wine, leather into shoes, timber into firewood or furniture.

Distinguished From Trespass.

Conversion differs from trespass as appropriation differs from disturbance. More specifically, the two wrongs differ in these respects:

I. As to force. Trespass always involves the exercise of force. Conversion may be committed by force, as where goods are taken; but it may also consist in mere passivity or non-feasance, as where one refuses to restore goods to their owner. Merely to keep hanging upon one's wall a picture belonging to and demanded by, another is a conversion. And conversion may be committed without at all touching the goods:

Reynolds vs. Shuler, *infra,* p. 294;
Bristol vs. Burt, *infra,* p. 293.

II. As to possession. Trespass always infringes the possession, and can therefore be committed only upon goods in the possession of another. Conversion may be made of goods rightfully in the possession of the wrongdoer, either by wrongfully using them before demand for their return, or by wrongfully retaining them after their return is demanded, or by wrongfully disposing of them before they are demanded:

Lord Petre vs. Heneage, *infra,* p. 293;
Beasley vs. Railroad Co., *infra,* p. 304;
Syeds vs. Hay, *infra,* p. 301.

III. As to title. Trespass may be quite consistent with a recognition of the owner's title to the goods. Conversion always imports the assertion of an antagonistic title or of a right superior to the owner's right of control; as where one sells the goods

of another, or buys them from one claiming title against the owner:

Davies vs. McCombie, *infra,* p. 302.

Or where one asserts against the goods some adverse title or right of lien:

Shipwick vs. Blanchard, *infra,* p. 312.

Or assumes authority to control the disposal of the goods:

Bristol vs. Burt, *infra,* p. 293.

An act may, therefore, be a trespass and not a conversion as where goods are interfered with or even taken, but not appropriated:

Fouldes vs. Willoughby, *infra,* p. 309;
Bushel vs. Miller, *infra,* p. 308.

An act may be a conversion, but not a trespass; as where goods are merely detained or a lien is asserted against them without disturbing the possession:

Reynolds vs. Shuler, *infra,* p. 294.

An act may be at once a trespass and a conversion because it involves both a disturbance of possession and an appropriation to some use of the wrongdoer:

Hoffman vs. Carow, *infra,* p. 296.

With respect to this distinction, compare the cases of

Cooper vs. Chitty, *infra,* p. 299;
Smith vs. Milles, *infra,* p. 301.

Title in Trover.

Trover is the form of action in which damages are recovered for a conversion. Wherever a conversion is committed, this action may be maintained; therefore, when we say that trover lies, we mean that it is a case of conversion. And by the title in trover, we mean the title which is requisite to enable the plaintiff to recover for conversion.

Title may be either, (1) general title, or the ultimate ownership of property; or (2) special title, or the right to the possession of property, in some limited manner or for some special purpose, such as that of a pledgee, factor, or other bailee, or of an officer having rightfully taken possession for some official purpose; or (3) bare possession, such as that of one who finds lost property.

Trover may be maintained, and damages recovered for conversion, by any one who has any of these three degrees of title, provided the character and present condition of the title be such as to entitle him to the immediate possession of the goods at the time of the conversion committed. The title requisite to recover in trover is, therefore, such as is requisite in trespass, namely, the right to the possession.

Thus, the general owner cannot maintain trover if, at the time of the conversion, he is not entitled to the present possession of the goods; as where they were in possession of a tenant holding them under a lease for a definite term:

Gordon vs. Harper, *infra,* p. 317.

On the other hand, bare possession is sufficient for the maintenance of trover unless the person converting the goods can show a better title in himself, or in one under whom he can rightfully claim, than the title of the possessor; here, as in trespass, the possession itself is sufficient against a mere wrongdoer, or one who infringes the existing possession without showing a better right: as where the jeweller undertook to keep a jewel from the boy who had found it:

Armory vs. Delamirie, *infra,* p. 316.

It is, therefore, of no avail to the defendant in trover to show that a third person has a better title or right of possession than the plaintiff, unless the defendant can connect himself with such *jus tertii,* that is, show that he has a right derived from the third person to deal with the property as he has dealt:

Webb vs. Fox, *infra,* p. 327.

Evidence of Conversion.

If the plaintiff has shown his sufficient title to the goods, direct proof that the defendant has committed with respect to them some act amounting to a conversion is, of course, sufficient to establish the liability of the latter. It may happen, however, that the goods can be traced to the defendant's possession, but it is impossible to show what he has done with them, or to show more than that he persists in retaining them after the plaintiff, having the right to immediate possession, has demanded them. In such a case it is, in the first instance, sufficient for the plaintiff to prove that the goods were in the possession of the defendant, that the plaintiff demanded them, and that the defendant refused to deliver them. The demand and refusal raise a presumption that the defendant has applied the goods to some use of his own, or that he is guilty of a wrongful detention which is equivalent to an appropriation of them. Therefore proof of a demand and refusal are evidence of a conversion, and this evidence is sufficient to entitle the plaintiff to recover unless on the other side something is shown to rebut the presumption:

Baldwin vs. Cole, *infra,* p. 319;
Wilton vs. Girdlestone, *infra,* p. 319;
Burroughes vs. Bayne, *infra,* p. 320.

In Baldwin vs. Cole, indeed, LORD HOLT declared that a refusal of goods upon a rightful demand was not merely evidence of conversion but of itself a conversion. But this has been often overruled; and the effect of such a refusal may be rebutted by proof of either (1) inability to deliver; or (2) a qualified refusal; or (3) the *jus tertii.*

I. Inability to deliver the goods may be due to the fact that they have been lost or destroyed while in the defendant's keeping or have been taken from his possession without any act on his part amounting to a conversion. Although his inability to deliver may be due to some fault of his, such as negligence, and he may be liable to the plaintiff on that account, that

fact does not render him guilty of conversion and liable in trover:

Mulgrave vs. Ogden, *infra,* p. 315;
Williams vs. Gesse, *infra,* p. 324;
Heald vs. Carey, *infra,* p. 323.

If, however, the defendant is unable to deliver the goods because he has sold, pledged, given away, or misdelivered them, or otherwise committed a conversion, he will be liable in trover.

Youl vs. Harbottle, *infra,* p. 302.

II. A qualified refusal is a denial of a demand for the goods unless the demandant shall make some reasonable showing of his right to the possession of them. If the requirement be no more than is reasonable, the defendant in imposing such a condition is not guilty of conversion:

Alexander vs. Southey, *infra,* p. 325;
Vaughan vs. Watt, *infra,* p. 326;
Green vs. Dunn, *infra,* p. 326.

III. *Jus Tertii,* or the right of a third person, which will rebut the presumption of conversion is not merely a title in another person than the plaintiff, or even a better right to the possession than his. It must be a title in a third person with which the defendant connects himself, as by showing that he detains the goods by the authority of one having a better right to them than the plaintiff has, or that he has delivered the goods to a person entitled to demand them as against the plaintiff. It has already been mentioned that the defendant cannot justify a detention of goods from one having a right of present possession—although such right may be no more than arises from possession itself—by setting up a title in a third person. But if a third person, having a higher right to the possession than the possessor from whom the defendant received the goods, has taken them from the defendant, or the defendant has delivered them to such owner or according to his directions, or if

the goods are retained by the authority of the third person, the defendant is not liable to his bailor as for a conversion:

Thorne vs. Tilbury, *infra*, p. 326;
Biddle vs. Bond, *infra*, p. 328;
The Idaho, *infra*, p. 330.

What Constitutes Conversion.

Lord Petre vs. Heneage, 12 Mod. 519. Nisi Prius (1699).

The defendant had been executor of the will of the late LORD PETRE, and as such had received among the assets of the estate a pearl necklace, which was an heirloom in the family and was accustomed to be worn by the Lady Petre for the time being. This necklace the defendant permitted his wife occasionally to wear, and for this he was held liable as for a conversion, it being declared by LORD HOLT, C. J.: "The wearing of a pearl is a conversion."

Bristol vs. Burt, 7 Johnson, 254. New York (1810).

The plaintiff transported a quantity of potash from the interior of the State to Oswego, on Lake Ontario, in July of 1808, at which time the Embargo Act prohibited commerce with British ports. The defendant was the collector of customs at Oswego; and to him Bristol applied for a clearance in order to ship the potash to Sackett's Harbor, in the adjoining county. Burt refused to issue the clearance, on the ground that he feared lest, if the goods should be sent to Sackett's Harbor, they would be thence shipped into Canada, he believing that the collector at Sackett's Harbor would not do his duty. The plaintiff then proposed to send his potash up the river, and into the interior of the State; but the defendant declared that this should not be done unless a bond were given for the transportation of the goods to Rome and for leaving them there whilst the embargo should continue. The potash was stored in a warehouse at Oswego, which was watched by two armed men in the employ of the collector; and there the goods remained until the autumn of 1808, when Burt gave permission to send them up the river, and the plaintiff received thirteen of his ninety-five barrels from

the warehouse. In the following February, Bristol shipped the remaining barrels to Rome, under a written permit of the defendant, who required of the consignee a written report as to the receipt of the potash and an oath that he did not intend to violate the law. In the meantime the price of potash had materially declined. Bristol brought an action of trover upon these facts. Chief Justice (afterwards Chancellor) Kent, who presided at the trial, charged the jury that there was sufficient evidence of conversion by the defendant, and that the plaintiff was entitled to recover the difference between the value of the potash at the time when he demanded a clearance, and at the time when he received his property. On motion for a new trial, this ruling was sustained.

KENT, C. J.: There were declarations and acts of the defendant united to form a control over the plaintiff's property. * * * There were the highest and most unequivocal acts of dominion and control over the property, not only by claiming jurisdiction over it, but in placing armed men near it to prevent its removal. This fact is, of itself, a conversion. It is intermeddling with the property in the most decisive manner, and detaining it for months in the storehouse. It was, therefore, bringing a charge upon the plaintiff; and this, says MR. JUSTICE BULLER, in Syeds vs. Hay, 4 T. R. 260, amounts to a conversion. Neither the case of McCombie vs. Davies, 6 East. 538, nor the Anonymous case in 12 Mod. 344, were so strong as this, and yet the conversion was maintained. It was assuming the dominion of the property which was made by LORD ELLENBOROUGH the test of the conversion, though the property in that case lay, not in the defendant's, but in the King's warehouse. The definition of a conversion in trover, as given by MR. GWILLIM, the editor of Bacon, and now a judge in India, applies precisely to this case; 6 Bacon Abridgement, 677.

"The action being founded upon a conjunct right of property and possession, any act of the defendant," says he, "which negatives, or is inconsistent with, such right amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant; it is not necessary that it should be shown that he applied it to his own use. Does he exercise a dominion over it in exclusion, or in defiance of the plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use."

Reynolds vs. Shuler, 5 Cowen, 323. New York (1826).

Reynolds had lent to one Gilman a sum of money, and to secure the loan had taken a mortgage upon divers articles used

by Gilman in his business as a distiller. The distillery operated by Gilman was the property of Stewart and Tullock and was occupied under a lease from them. Gilman allowed his rent to fall into arrear and also made default in the payment of his debt to Reynolds; whereupon the latter caused the mortgaged articles to be removed from the distillery and stored in a coal house belonging to himself. A few days later the defendant, Shuler, acting as bailiff for Stewart and Tullock, distrained the chattels for rent due to the landlords, but did not remove the goods from Reynolds' coal house. Shortly afterwards, in pursuance of the statute applicable to distresses, Shuler sold the chattels at auction, they still remaining in the coal house, whence they had not been removed by the purchaser when this action was commenced. Reynolds sued Shuler in trover, and one question was whether the act of the latter in selling the articles constituted a conversion. *Held,* that the sale was sufficient to amount to conversion if the defendant had not the right to distrain. However, the court being of opinion that in this case the articles were subject to the landlord's lien for rent, the judgment was for the defendant.

SUTHERLAND, J.: It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant. It is not necessary to show that he has applied it to his own use. If he undertakes to exercise a dominion over it, in exclusion or in defiance of the plaintiff's right, that is, in law, a conversion, whether it be for his own or another person's use. Hence a redelivery of the thing will not protect him from the action. 6 Bac. Abridg. 677.

In Shipwick vs. Blanchard, 6 T. R. 298, the defendant entered upon the premises of the plaintiff, and gave him written notice that he seized and distrained his goods for rent. The plaintiff paid the rent, and then brought an action of trover for taking the goods, the defendant having no right to distrain. It was contended by Chambre and Holroyd, for the defendant, that trover would not lie, because there was no taking in fact, but only a notice to the plaintiff that the things were taken, without any removal of them or actual laying hands on any part of them. But it was answered by LAW [afterwards LORD ELLENBOROUGH] that, if a party claim and assert a dominion over goods, especially turning the possession of them to his own profit, that is a clear possession in law to subject the wrongdoer to an action of trover; and the action was sustained. * * *

The undertaking to sell, under color of legal process, another man's goods, is an assumption of a right to dispose of them, of the highest and most unequivocal character. It must, almost of necessity, bring a

charge upon the party to a greater or less extent; and that, in the opinion of BULLER, J., in Syeds vs. Hay, 4 T. R. 260, is sufficient.

If the property in question, therefore, was the plaintiff's, and was not liable to be distrained, no matter what became of it subsequent to the sale, trover may be maintained to recover his damages. In estimating those damages, it may be proper to inquire what became of the property after the sale. If the plaintiff repossessed himself of it before suit brought, it would not deprive him of his action, though it would diminish his damages. For it is well settled that trover lies for damages for the conversion of a chattel, notwithstanding it is restored before suit brought. The action is not to recover the thing, but damages for the conversion. The restoration or the recovery of the property goes only in mitigation of damages.

The plaintiff is to be presumed to have acquired the possession of the property with the knowledge and assent of Gilman, who had mortgaged it to him. Indeed, this is fairly to be inferred from the evidence. He was, then, a mortgagee in possession; and, as such, had a sufficient property in the goods to entitle him to maintain trover for their conversion.

Hoffman vs. Carow, 20 Wendell, 21. New York (1838).

Goods belonging to the plaintiff were stolen from him in New York, carried to Baltimore, and there placed for sale in the hands of the defendants, who were auctioneers. The defendants had no knowledge or reason to believe that the goods had been stolen, but accepted and sold the property in the usual course of business, and paid over to the thief, or to some person deriving possession from him, the proceeds of the sale less their commission for selling. The plaintiff brought an action of trover, in which it was held that the defendants, notwithstanding their innocence of wrongful intent, were guilty of a conversion in selling the goods.

Parker vs. Godin, 2 Strange, 813. King's Bench (1728).

One Satur, being a bankrupt, absconded, leaving with his wife some plate, to which his assignees, though not appointed until afterward, became entitled at once by relation of their title to the act of bankruptcy: see Cooper vs. Chitty, *infra*. Mrs. Satur, in order to raise money upon the plate, sent it by her servant to a banker. The defendant accompanied the servant to the banker's door, where he took the plate from her, carried it into the shop, and negotiated the desired loan, for which, in addition to the plate as security, he gave his own note. He immediately turned over the borrowed money to Mrs. Satur. The assignees of the bankrupt sued Godin in trover, upon the theory that his

conduct in the matter constituted a conversion of the plate. The jury, "considering the defendant acted only as a friend and that it would be hard to punish him, found a verdict for the defendant. But, upon application to the Court, a new trial was granted, upon the foot of its being an actual conversion in the defendant, notwithstanding he did not apply the money to his own use, and, upon a second trial, the plaintiffs obtained a verdict for the value of the plate."

Levi vs. Booth, 58 Md. 305 (1882).

The plaintiff was the owner of a valuable diamond ring, which he placed in the possession of De Wolff, a dealer and trader in jewellery, for the purpose of obtaining a match for it, or, failing in that, to get an offer for it. These were the only purposes for which De Wolff was given possession, and he was not authorized in any manner to dispose of the diamond. De Wolff, who was an itinerant vendor of jewellery and had no shop or regular place of business, was accustomed to deal with the defendants, who were pawn-brokers, and who sold to him diamonds, watches and other jewellery suited to his trade. De Wolff sold the diamond ring belonging to the plaintiff to Henry Levi, one of the defendants. The plaintiff proved that, before this sale, Henry Levi had been informed that De Wolff had no power or authority to sell this ring, it being the property of the plaintiff. When demand for the ring was made upon Levi, he stated that it had been sold to some one whose name he did not know and could not ascertain. The plaintiff brought this action in trover for the conversion of the ring.

Held, that the sale of the diamond by the defendant was a conversion, since De Wolff, through whom the defendant acquired possession, had no authority to sell and thereby divest the owner of his right in the property.

ALVEY, J.: It is certainly a well-established principle of the common law, founded, as it would seem, upon a maxim of the civil law, *nemo plus juris in alium transferre potest quam ipse habet*, that a sale by a person who has no right or power to sell, is not effective as against the rightful owner. Sales made in market overt were an exception to this general rule; but the old Saxon institution of market overt has never been recognized in this State, nor, as far as we are informed, in any of the United States. At the common law, therefore, a person in possession of goods cannot confer upon another, either by sale or pledge, any other or better title to the goods than he himself has. To this general rule there is an apparent exception in favor of *bona fide* purchasers or pledgees, where the party in possession making the sale or pledge has a title defeasible on account of fraud, or by reason of a condition in the contract of sale under which he holds. Therefore, to make either a sale or pledge valid as against the real owner, where the sale or pledge is made by another person, it is incumbent upon the person claiming under such sale or pledge, to show that the party making it had authority from the owner. If, however, the real owner of the goods has so acted as to clothe the seller or pledgor *with apparent* authority to sell or pledge,

he will, even by the common law, be precluded from denying, as against those who may have acted *bona fide* on the faith of that *apparent authority*, that he had given such authority, and the result, as to them, is the same as if he had really given it; but it is, of course, otherwise in respect to those who may have acted with notice of the want or limitation of authority in point of fact.

This principle of estoppel, as applied to sales and pledges of goods or merchandise, is aptly and completely illustrated in the case of Pickering vs. Busk, 15 East. 38. The case was decided before the passage of any of the English Factor Acts, and the facts were, that the true owner had bought parcels of hemp through Swallow, who was a broker and an agent for sale. At the instance and request of the plaintiff, the real owner, the hemp was transferred in the books of the wharfinger from the name of the seller to that of Swallow, who, without express authority from the owner, afterwards sold it. In an action of trover by the real owner, to recover for the conversion of the hemp thus sold, it was held, that the transfer on the books of the wharfinger by the direction of the plaintiff to the name of Swallow, authorized the latter to deal with the hemp as owner with respect to third persons, and that the plaintiff, who had thus enabled Swallow to assume the appearance of ownership to the world, should abide the consequences of his own act. * * * In this case there is no evidence that there was any express authority by the plaintiff to De Wolff to sell the ring; though there is evidence that De Wolff was authorized to procure an offer for it. This, of course, reserved to the plaintiff the right to accept or reject the offer, if one was made. With this limitation of authority, there can be no question of the principle propounded in the plaintiff's first prayer; for that goes upon the hypothesis that there was no sale in fact to Levi, but that the ring was simply left with the defendants; and that they afterwards, without other authority, sold it. If it be true that there was no sale to the defendants, or one of them, and that they, simply having the possession, and without authority for so doing, sold or disposed of the ring, it is clear that they were wrongdoers, and therefore liable for the conversion. * * *

Independently of the provisions of the statute in regard to the dealings with agents and factors, it is very clear, upon the principles that we have already stated, that the *bare possession* of goods by one, though he may happen to be a *dealer* in that class of goods, does not clothe him with power to dispose of the goods as though he were owner, or as having authority as agent to sell or pledge the goods, to the preclusion of the right of the real owner. If he sells as *owner* there must be some other *indicia* of property than mere possession. There must, as in the case of Pickering vs. Busk, be some act or conduct on the part of the real owner whereby the party selling is clothed with the apparent ownership, or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of an innocent third party dealing on the faith of such appearances. If it were otherwise, people would not be secure in sending their watches or articles of jewelry to a jeweller's establishment to be repaired, or cloth to a clothing establishment

to be made into garments. * * * It is true, the general rule of the common law, that a person in the sale or pledge of goods cannot confer a greater or better title than he himself possesses, has, to some extent and under special circumstances, been modified by statute. * * * The general effect of these statutes is to render valid sales and pledges made by factors and agents, in cases where the agency may not be known to the buyer, or notwithstanding notice of the fact of their being merely agents or factors, provided the parties dealing with them shall not have notice that they are acting without authority or *mala fide*. * * *

It is conceded by these prayers, and, indeed, shown by the proof offered by the defendants, that the ring had been sold or disposed of by them, or one of them, before the demand made by the plaintiff. And such being the case, whether De Wolff had sold the ring without authority, or had only left it with them, or one of them, and they had sold it, such wrongful sale by them was of itself a conversion, and no demand was necessary. And though it may be apparently hard on those who deal innocently and in the ordinary course of business with a person in possession of goods, yet it is a settled principle, that if there has been what amounts in law to a conversion of the plaintiff's goods, by any one, however innocent, that person will be liable for the value of the goods to the real owner. In the case of Stephens vs. Elwell, 4 M. & S. 259, LORD ELLENBOROUGH laid it down as clear law, that a person is guilty of conversion who intermeddles with the property of another and disposes of it, and it is no answer that he acted on authority from some other person, who had himself no authority to dispose of it. And the same principle, to its fullest extent, was laid down as settled law, by the House of Lords, in the case of Hollins vs. Fowler, L. R. 7 H. L. 757.

Cooper vs. Chitty, 1 Burrow, 20. King's Bench (1756).

One William Johns, a tradesman in London, committed an act of bankruptcy on the 4th of December, 1753. On the next day, one Godfrey, being a creditor of Johns, obtained a judgment against him, and issued execution thereon. On the same day, the defendants in this case, who were the sheriffs of London, acting as such, seized some of Johns' goods under Godfrey's execution. On the 8th Johns was adjudicated a bankrupt, and the plaintiffs were appointed assignees, whereupon they became entitled to all of the bankrupt's goods; and, as was held in this case, their title vested, by relation, as of the date when the act of bankruptcy was committed. On the 28th of December, the defendants, as sheriffs, sold the goods which they had seized as the goods of Johns in satisfaction of Godfrey's execution; and on the 20th of January, 1754, they made return of the writ issued by Godfrey. Thereupon, Cooper and

the other assignee brought this action of trover against the sheriffs, alleging a conversion by the latter in the sale of the Johns goods, which were claimed by the plaintiffs to have been vested in themselves as of the 4th of December. On behalf of the defendants it was urged that they were innocent of any wrongful intention, for "they were compellable by the writ of *fieri facias* to seize the goods and levy the debt," and "till the commission and assignment the property was in the bankrupt, and it did not appear that a commission would ever be taken out."

Held, however, that the title of the assignees related to the act of bankruptcy, and that the sheriffs, in seizing the goods after that fact, committed a conversion.

LORD MANSFIELD: It is an action of trover.

The bare defining the nature of this kind of action, and the grounds upon which the plaintiff is entitled to recover in it, will go a great way towards the understanding, and consequently the solution, of the question in this particular case.

In form it is a fiction; in substance, a remedy to recover the value of personal chattels wrongfully converted by another to his own use.

The form supposes the defendant may have come lawfully by the possession of the goods. This action lies, and has been brought in many cases, where, in truth, the defendant has got the possession lawfully. Hence, if the defendant delivers the thing upon demand, no damages can be recovered in this action for having taken it.

This is an action of tort; and the whole tort consists in the wrongful conversion. Two things are necessary to be proved, to entitle the plaintiff to recover in this kind of action: 1st, property in the plaintiff; and, 2dly, a wrongful conversion by the defendant.

As to the first, it is admitted in the present case that the property was in the plaintiffs as on and from the 4th of December, which was before the seizure, by relation. This relation the statute concerning bankrupts introduced, to avoid frauds. They vest in the assignees all the property that the bankrupt had at the time of what I may call the crime committed (for the old statutes consider him as a criminal) * * *.

Secondly. The only question then is, whether the defendants are guilty of a wrongful conversion.

That the conversion itself was wrongful is manifest. The sheriff had no authority to sell the goods of the plaintiffs; but of William Johns only; they ought to have delivered these goods to the plaintiffs, the assignees. * * *

It is admitted, on the part of the defendants, that the innocent vendee of the goods so seized can have no title under the sale, but is liable to an action; and that Godfrey, the plaintiff, would have no title to the

money arising from such sale, but, if he received it, would be liable to an action to refund.

Smith vs. Milles, 1 T. R. 475. King's Bench (1787).

One Clarke, a trader, committed an act of bankruptcy on February 1, 1786. About that date one of his creditors, Atkinson, obtained a judgment against him, on which a writ of *fieri facias* was issued on February 13th and lodged with the defendant Milles, the sheriff, for execution. On the 23rd Milles took some of Clarke's goods under this writ. On the 28th Clarke was declared a bankrupt and all his assets were vested in the plaintiffs in this cause as assignees, their title by virtue of the statute relating to the act of bankruptcy. The assignees notified the sheriff of the adjudication and of the appointment. Afterwards, on March 13th and on subsequent days, and notwithstanding the notice given by the assignees, the sheriff sold the goods which he had taken upon the execution against Clarke. The assignees sued the sheriff in trespass, contending that the relation of their title to the act of bankruptcy gave them a constructive possession of the bankrupt's goods from February 1st.. *Held*, that the assignees were not, in virtue of their subsequently acquired title, in possession on February 23rd; and that, while trover might lie as for a conversion of the goods after the appointment of the assignees, they could not, for want of possession at the time of the taking, maintain trespass.

Syeds vs. Hay, 4 Term Rep. 260. King's Bench (1791).

The plaintiff had shipped certain goods by the defendant's vessel, and had directed the latter not to discharge them upon a wharf, as it was the plaintiff's intention to come to the vessel when she should arrive and take the goods directly therefrom. Contrary to this instruction, the defendant placed the goods upon a wharf, whereby a charge for wharfage at once attached to them, which charge the plaintiff was obliged to pay before he could get possession of his property. Instead of taking up the goods, he sued the shipmaster in trover for their value, the theory being that the unauthorized deposit of the plaintiff's property upon the wharf amounted to a conversion. And it was so held.

BULLER, J.: I am of opinion that the objection to the form of the action is not well founded. For the plaintiff gave express orders to the defendant not to land the goods on the wharf, to which the latter agreed at the time, but afterwards disobeyed those orders and delivered the goods into the possession of the wharfinger; now on these facts I think that trover will lie. I cannot go on the ground that the wharf-

inger was the plaintiff's agent; for, so far from it, the plaintiff expressly dissented to the goods being sent there. And if one man, who is intrusted with the goods of another, put them into the hands of a third person contrary to orders, it is a conversion. If a person takes my horse to ride, and leave him at an inn, that is a conversion; for, though I may have the horse on sending for him and paying for the keeping of him, yet it brings a charge upon me. So here, the defendant, by putting these goods into the custody of the wharfinger, brought a charge upon the plaintiff.

Youl vs. Harbottle, 1 Peake, 49. Nisi Prius (1791).

The plaintiff put some goods on board the defendant's boat to be carried from London to Gravesend and there delivered to a certain consignee. Another person than the consignee claimed the goods at Gravesend, and the defendant, under a mistake, delivered the goods to him. The plaintiff sued in trover.

Ersbine, for the plaintiff, relied upon Syeds vs. Hay.

LORD KENYON, C. J.: That case was determined on such peculiar circumstances that it is hardly possible it should ever apply as an authority in a case not exactly parallel to it. I agree that, when a carrier loses goods by accident, trover will not lie against him; but when he delivers them to a third person, and is an actor, though under a mistake, this species of action may be maintained. [Verdict for the plaintiff.]

McCombie vs. Davies, 6 East, 538. King's Bench (1805).

The plaintiff employed one Coddan, a tobacco broker and a dealer in tobacco on his own account, to buy for him a quantity of tobacco. Coddan bought the tobacco, which was in the King's warehouse subject to the payment of duties, and had it transferred to his own name on the books of the warehouse. Afterwards Coddan pledged the tobacco to Davies, to secure a loan made by the latter to the former, and caused the goods to be transferred to Davies on the books. Davies knew nothing of Coddan's acting for McCombie in the matter, but supposed that the tobacco was the property of Coddan. Accordingly, when McCombie demanded that Davies should deliver the goods to him, Davies declined to do so until he should be repaid the money which he had advanced to Coddan. McCombie sued Davies in trover, and the case was tried at *nisi prius* before

LORD ELLENBOROUGH, C. J., sitting at Guildhall in London. As the plaintiff's case was presented at the trial, the claim of conversion was based solely upon the defendant's refusal to give an order for the delivery of the tobacco from the warehouse; and this LORD ELLENBOROUGH held not to constitute a conversion, being a mere nonfeasance; wherefore the plaintiff was nonsuited. On a motion for a new trial, the court took a different view of the case, and held that the defendant's taking an assignment of the property was a conversion. A new trial was ordered, and the plaintiff got a verdict, upon which judgment in his favor was entered: 7 East. 5.

At the argument on the motion for new trial, the plaintiff's counsel contended: 1st. That the defendant's refusal to give an order for the delivery of the tobacco was a conversion; and, 2nd, that his asserting dominion over it, and taking it by the wrongful act of the broker was the same tort against the plaintiff.

LORD ELLENBOROUGH said that the latter was the true ground to put the plaintiff's case upon; and, if the case had been so presented to him at the trial, there would probably have been no non-suit; but it was put upon the ground that the not giving of an order for the delivery of the tobacco from the King's warehouse was in itself a conversion, in which I could not concur, not conceiving that the mere not doing of an act was a conversion. But, taking the case higher up, upon principle I think that the defendant's acts amount to a conversion. According to LORD HOLT, in Baldwin vs. Cole, the very assuming to one's self the property and right of disposing of another man's goods is a conversion, and certainly a man is guilty of conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect?

Reader, for the defendant, submitted to the opinion of the court thus expressed as to the point of conversion, but suggested that there was no appropriation of the specific tobacco by the broker, who purchased in his own name, to the plaintiff's use, so as to give him the legal property in it. But

LORD ELLENBOROUGH, C. J., said that, as between the broker and his employer, there was an appropriation of it to the latter, though it might not so appear to the public at large.

Beasley vs. Railroad Company, 27 App. D. C. 595 (1906).

Bradshaw and Mulcahey had at Tampa, Florida, in April, 1899, four racehorses which they had been training in the South, and which they desired to enter in the Benning races at Washington, then shortly to occur. The horses were shipped at Tampa, by a line of railway terminating at that point, billed to Washington by a through bill of lading which fixed the charge for the transportation at $130.10. The horses, having passed over several connecting lines, reached Washington by the Baltimore and Potomac Railroad. Bradshaw and Mulcahey visited the freight office of that company, presented their bill of lading, and tendered $130.10 in payment of charges, and demanded the horses. The agent of the company, however, had received, along with the car containing the horses, a paper called a way-bill, which was a document made up by servants of the connecting lines and transmitted for the guidance of the terminal carrier; and in this paper, for some reason, the charges to be collected were stated as $201.60. This sum, accordingly, the agent demanded before he would deliver the horses. The shippers refused to pay more than $130.10, insisted that there was a mistake in the way-bill, and offered to pay the cost of telegraphing to Tampa and ascertaining the true rate. The agent declined to telegraph, but instituted correspondence by mail for the purpose of verifying the bill of lading. Pending this inquiry the horses were sent to a stable, where they received such care as was appropriate to horses in general, but not such as racehorses required; and their value for racing purposes was therefore greatly impaired or altogether destroyed. After the lapse of six days, the agent of the company was informed that the correct charge was $130.10, and was instructed to deliver the horses upon the payment of that sum. This he offered to do, but the shippers declined to accept the animals. This action of trover was brought by Bradshaw for the value of two of the horses which belonged to him; and after Bradshaw's death pending litigation, suit was continued by his administrator. *Held,* that the railroad company was liable as for a conversion of the horses, unless a jury should be of opinion that the refusal to

deliver at first was reasonable, and that the delay in verifying the bill of lading also was reasonable.

DUELL, J.: It is contended by the appellee that his refusal to surrender the horses was a conditional refusal, and therefore does not amount to a conversion. We cannot agree with such claim, and the weight of authority certainly does not support the contention. Trover will lie for the value of property illegally withheld under an unlawful claim for freight charges: Marsh vs. Union P. R. Co., 3 McCrary, 236, 247; 9 Fed. 873; Adams vs. Clark, 9 Cush. 215; Richardson vs. Rich, 104 Mass. 156. In the case at bar we have a demand by the owner of the horses, with a tender of the contract price for their carriage, and a refusal to deliver them except upon payment of a sum in excess thereof. This is at least *prima facie* evidence of a conversion. To offset this, the appellee insists that it had a right, in view of the circumstances, to detain the horses for the purpose of ascertaining whether the bill of lading correctly stated the amount due, or whether a way bill which was in its possession set forth the true amount. Admitting, without conceding, the correctness of this contention, the appellee would only be entitled to hold them for a reasonable time: Northern Transportation Co. vs. Sellick, 52 Ill. 249. As was said in that case, which is one where a carrier refused to deliver a carriage until a larger sum than the contract price was paid:

"It was their duty to deliver the carriage * * * on its arrival, on his offering to pay the freight agreed upon. The refusal to do so was wrongful, and was in itself evidence of a conversion of the property. The demand in June, on the arrival of the carriage, gave appellants an opportunity of delivering the carriage to appellee, and thus relieving themselves from all responsibility. Refusing to do so, unless on compliance with an extortionate demand, greatly beyond the agreed compensation for carrying, threw the entire responsibility, in case of loss, upon the appellants. * * * The refusal to deliver is evidence of a conversion, and appellants have offered nothing to destroy its effect." * * *

The admitted testimony shows that appellee's agent declined to take any steps outside the usual leisurely custom to learn the correct amount to be collected. It took the appellee six days to learn that it was unlawfully detaining the horses. We cannot say, and we think the trial court could not say, as it virtually did by directing a verdict for the appellee, that six days was so clearly a reasonable time that there was no room for submitting the question of due diligence to the jury. * * *

We may concede that appellee had a lien upon the horses for its own freight charges and the charge of the preceding carriers, and until that lien was satisfied it had a right to hold the horses. That lien, however, was only to the extent of the contract price as shown by its bill of lading. If it claimed a lien for a larger sum it did so at its peril. Appellant's testator was not bound to submit to any different charge. He was under no legal obligation to pay the unlawful charge and take his chances of the repayment of the amount of its overcharge. To establish any such rule would result in putting every shipper of goods at the mercy of the carrier.

Crossier vs. Ogleby, 1 Strange, 60. King's Bench (1716).

Trover by an administrator for rum taken and converted in the intestate's life. Upon evidence it appeared that the rum was taken in the intestate's life, but not used till after his death. And the question was, whether this evidence of not using it till the administrator's time would not overthrow the declaration of a conversion in the intestate's life.

Sed per curiam. The time of using the rum lay in the breast of the defendant, who ought to have disclosed that matter by his plea; and the taking in the life of the intestate, and keeping it until his death, is a trover and conversion sufficient to maintain this declaration. Wherefore the plaintiff had judgment.

Richardson vs. Atkinson, 1 Strange, 576. King's Bench (1723).

They held that the drawing out part of a vessel and filling it up with water was a conversion of all the liquor, and the jury gave damages as to the whole.

Philpott vs. Kelley, 3 Ad. & El. 106. King's Bench (1835).

In 1825 the plaintiff entrusted a cask of wine belonging to him to one Croasdill for safe-keeping, and Croasdill deposited it in the cellar of Mrs. Kelley, his mother-in-law. In 1826 Croasdill became bankrupt, and his assignees demanded the wine of Mrs. Kelley, who refused to surrender it. A few days later Philpott's solicitors notified her not to give up the cask except to him. The defendant said: "I will take care that the wine does not go out of my cellar," but did not say what she would do with it. In the early part of 1827 the wine was becoming deteriorated by remaining in the wood; and Mrs. Kelley bottled a part of it, which part she afterwards used. In March, and again in November, of 1827, Philpott's solicitors demanded the wine, proposing to indemnify the defendant against any other claims, but to these demands the defendant gave no distinct answer. Another demand was made in April, 1833, by Philpott, with the consent of Croasdill's assignees; and the present action was brought in October, 1833.

By the statute of limitations then in force, an action of trover was barred by the lapse of six years after the conversion.

Mrs. Kelley's defence was that her bottling part of the wine in 1827 constituted a conversion of the whole, so that the statute commenced to run from that act, and also that demand had been made by the plaintiff more than six years before the bringing of the suit. LORD CHIEF BARON LYNDHURST, before whom the case was tried, left it to the jury to say whether Mrs. Kelley had bottled the wine with a purpose to convert it to her own use, and whether she had refused to deliver it more than six years before October, 1833; if they found in the affirmative on either point, the verdict should be for the defendant. The jury found for the plaintiff. *Held,* that the direction of the trial court was correct, and that the facts warranted the verdict returned.

LORD DENMAN, C. J.: I think it was not proved in this case that there had been a conversion more than six years before the action was brought. There was, indeed, some evidence of facts upon which an action might have been commenced earlier; whether a jury would have found for the plaintiff upon that evidence, I cannot say, but it would not have been satisfactory to me. It appears that, on the bankruptcy of the person who deposited this wine, there were two parties who claimed it. * * * In the early part of the proceedings, it is evident that the defendant considered herself as balancing between two claims adverse to each other. The circumstance of the wine having been bottled was one upon which the jury were to put their own construction; they have done so, and I think rightly. The question was merely one of fact.

LITTLEDALE, J.: As to the bottling, there is no evidence who directed that to be done; but it appears that the wine was deteriorated by being kept in the wood; and the most obvious inference from the facts would be that the plaintiff, for whom it was deposited, desired that it should be bottled. This, however, being done, some of the wine was afterwards consumed; but at what time that happened does not appear; and the fact, I think, is not available to show that the bottling was in itself an act of ownership amounting to a conversion. It was not such an act if done by the direction of the party depositing, or if done for the best, with a view to preservation.

PATTESON, J.: It is contended that the bottling of the wine was a conversion; and I do not say that it would not have been so if the defendant had clearly done it on her own account and adversely to the proprietor. But it appears to have taken place just when the assignees and the plaintiff were demanding the wine; and it is much more like an act done to preserve it until the right could be ascertained than an act of ownership. It is urged, however, that the wine was afterwards consumed by the defendant. But, in the first place, there is no proof

when that happened, and we are not to make a presumption in favor of a party setting up his own wrong. And, secondly, even if a part of the wine was drunk more than six years before the commencement of the action, I think that the mere taking away or destroying a part of the property which remains in the hands of the bailee is not such a conversion that the owner may sue in trover for the whole. In Richardson vs. Atkinson, 1 Stra. 576, where part of the liquor was drawn off, it was held to be a conversion, but the defendant had filled the vessel up with water. I am not prepared to say that, if a person draws off part of the contents of a cask, and is ready to deliver the rest, his taking away such part is necessarily a conversion of the whole. No case has gone to that length yet.

COLERIDGE, J.: As to the acts themselves, the bottling, particularly when coupled with the consumption of the wine afterwards, might, if it had been ascertained when and by whose direction the bottling took place, have been evidence of a conversion of the whole. But this must depend upon the circumstances, and some of these, we know, lead to a contrary conclusion; as, for instance, the state of the wine when remaining in the wood. The drinking may have been intended when the wine was bottled, or may have been thought of afterwards; that was for the jury. As to the legal effect of the consumption of part of the wine, I agree with my brother PATTESON; I should be sorry if it could ever be held that taking a part of the property under such circumstances amounted to a conversion of the whole; that the fraud so committed, and the ignorance of the party against whom it was practised, could protect the wrongdoer from an action; and that a person who had been for a long time a bailee of a quantity of wine, and who had drunk six dozen, or one dozen of it, six years ago, might set that up as a defence against the claim of the owner. * * * With respect to the alleged demand and refusal, that would be only evidence of a conversion; and, as to the fact of demand and refusal, we do not know enough from the case before us to say that the conclusion insisted upon by the defendant is the only proper one.

Bushel vs. Miller, 1 Strange, 128. Nisi Prius (1718).

Upon the Custom House Quay in London was a hut or cabin in which porters bringing goods for shipment were accustomed to leave them until the vessels were ready. Each porter had the use of a particular box or cup-board in the cabin for the storage of the articles brought by him. The plaintiff, one of such porters, deposited in this hut certain goods belonging to A, and laid them so that the defendant, who also was a porter and had the use of another box, could not get into his box without removing the said goods. Accordingly the defendant, in making access to his own compartment, removed the goods about a

yard from the place where they lay, and towards the door; and he went away without returning them to their former position. The goods were lost; the plaintiff paid A for them, and brought an action of trover for their value against the defendant; whereupon at the trial it was ruled by PRATT, C. J.:

1. That the plaintiff, having made satisfaction to A for the goods, had thereby acquired a sufficient property in them to maintain trover.

2. That there was no conversion in the defendant. The plaintiff, by laying his goods where they obstructed the defendant from going to his chest, was in that respect a wrongdoer. The defendant had a right to remove the goods, so that, thus far, he was in no fault. Then, as to the not returning the goods to the place where he found them, if this were an action of trespass, perhaps it might be a doubt; but he was clear it could not amount to a conversion.

Foulds vs. Willoughby, 8 M. & W. 540. Exchequer (1841).

Willoughby operated a ferry between Liverpool and Birkenhead. Foulds, desiring to be ferried to Liverpool, went upon the boat, having with him two horses. Before the boat started, Foulds so misbehaved himself that Willoughby ordered him to take his horses and go ashore. This Foulds refused to do, whereupon the ferryman drove the horses from the boat. Foulds remained where he was and was carried to Liverpool. The horses, being ashore and loose on the Birkenhead side, wandered about for some time, and were at length taken up and stabled at an inn. On the next day Foulds demanded the horses from the inn keeper, who refused to surrender them unless paid for their keep. Foulds declined to redeem his property and brought this action of trover against Willoughby, conceiving that the act of putting the horses ashore constituted a conversion of them.

Held, that, while the act of the ferryman may have been tortious and a trespass, it was not a conversion, there having been no appropriation of the property to the use of himself or of any one else.

In the course of the argument occurred this colloquy:

Watson (for the plaintiff): A wrongful removal of a chattel, even for a few yards, amounts in law to a conversion.

LORD ABINGER, C. B.: According to that argument, every trespass is a conversion.

Watson: If a man takes and rides another's horse without his consent, however short a distance, it is in law a conversion.

ALDERSON, B.: In that case there is a user of the horse.

LORD ABINGER, C. B.: In this case the horses were turned out of the boat by the defendant because the owner refused to take them out, and not with any view to appropriate them to his own use, but to get rid of the owner.

ALDERSON, B.: If a man were to remove my carriage a few yards, and then leave it, would he be guilty of a conversion?

Watson: In the notes to Wilbraham vs. Snow, 2 Wms. Saunders, 470, it is said: "Wherever trespass for taking goods will lie, that is, where they are taken wrongfully, trover will also lie; for one may qualify but not increase a tort": citing Bishop vs. Montague, Cro. Eliz. 824.

LORD ABINGER, C. B.: I can not agree to that position, at least to the extent for which it is now used.

Counsel for the plaintiff relied also upon Syeds vs. Hay, 4 T. R. 264, and Mulgrave vs. Ogden, Cro. Eliz. 219. For the defendant were cited Bushel vs. Miller, 1 Stra. 128; Cooper vs. Chitty, 1 W. Bl. 65; Garland vs. Carlisle, 2 Cr. & M. 31.

In delivering the opinions of the court were made the observations which follow:

LORD ABINGER, C. B.: It is a proposition familiar to all lawyers that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion. I had thought that the matter had been fully discussed, and this distinction established by the numerous cases which have occurred on this subject; but, according to the argument put forward by the plaintiff's counsel today, a bare *asportavit* is a sufficient foundation to support an action of trover. I entirely dissent from this argument; and therefore I think the learned judge was wrong in telling the jury that the simple fact of putting these horses on shore by the defendant amounted to a conversion of them to his own use. In my opinion, he should have added to his direction that it was for them to consider what was the intention of the defendant in so doing. If the object, and whether rightfully or wrongfully entertained is immaterial, simply was to induce the plaintiff to go on shore himself, and the defendant, in furtherance of that object, did the act in question, it was not exercising over the horses any right inconsistent with, or adverse to, the right that the plaintiff had in them. * * *

In order to constitute a conversion, it is necessary either that the party taking the goods should intend some use to be made of them, by

himself or by those for whom he acts, or that, owing to his act, the goods are destroyed or consumed to the prejudice of the lawful owner. As an instance of this latter branch of this definition, suppose, in the present case, the defendant had thrown the horses into the water, whereby they were drowned, that would have amounted to an actual conversion; or, as in the case cited in the course of the argument [Mulgrave vs. Ogden], of a person throwing a piece of paper into the water; for, in these cases, the chattel is changed in quality, or destroyed altogether. But it has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favor of the party himself or of any one else, amounts to a conversion of the chattel. In the present case, therefore, the simple removal of these horses by the defendant, for a purpose wholly unconnected with any the least denial of the right of the plaintiff to the possession and enjoyment of them, is no conversion of the horses.

ALDERSON, B.: Any asportation of a chattel for the use of the defendant or of a third person amounts to a conversion; for this simple reason, that it is an act inconsistent with the general right of dominion which the owner of a chattel has in it, who is entitled to the use of it at all times and in all places. When, therefore, a man takes that chattel, either for the use of himself or of another, it is a conversion. So, if a man has possession of my chattel, and refuses to deliver it up, this is an assertion of a right inconsistent with my general dominion over it, and the use which, at all times and in all places, I am entitled to make of it; and consequently amounts to an act of conversion. So the destruction of the chattel is an act of conversion, for its effect is to deprive me of it altogether. But the question here is, where a man does an act, the effect of which is not for a moment to interfere with my dominion over the chattel, but on the contrary, recognizing throughout my title to it, can such an act as that be said to amount to a conversion? I think it cannot. Why did the defendant turn the horses out of his boat? Because he recognized them as the property of the plaintiff. He may have been a wrongdoer in putting them ashore; but how is that inconsistent with the general right which the plaintiff has to the use of the horses? It clearly is not; it is a wrongful act done, but only like any common act of trespass, to goods with which the party has no right to meddle. Scratching the panel of a carriage would be a trespass; but it would be a monstrous thing to say that it would be a ground for an action of trover; and yet to that extent must the plaintiff's counsel go if their argument in this case be sound.

But such is not the law; and the true principle is that stated by CHAMBRE and HOLROYD, JJ, when at the bar, in their argument in the case of Shipwick vs. Blanchard, 6 T. R. 299, that "In order to maintain trover, the goods must be taken or detained, with intent to convert them to the taker's own use, or to the use of those for whom he is acting." This definition, indeed, requires an addition to be made to it, namely, that the destruction of the goods also will amount to a conversion. For these reasons, I think, in the case before us, the question ought to have been left to the jury to say whether the act done by the defendant, of

seizing these horses and putting them on shore, was done with the intention of converting them to his own use, *i. e.*, with the intention of impugning, even for a moment, the plaintiff's general right of dominion over them. If so, it would be a conversion; otherwise not.

Shipwick vs. Blanchard, 6 T. R. 299. King's Bench (1795).

Mrs. Shipwick occupied a house as the tenant of one Grunden. The landlord committed an act of bankruptcy on account of which he might have been adjudged a bankrupt had any of his then creditors seen fit to institute proceedings to that end; but none of such persons did so. Sometime afterward, however, Grunden became indebted to a new creditor, and this debt, contracted subsequently to his act of bankruptcy, he failed to pay. The new creditor caused Grunden to be adjudged a bankrupt, the proceeding being based upon the act of bankruptcy committed at a time when the petitioning creditor was not legally concerned in Grunden's affairs. Blanchard was appointed assignee of Grunden's property, and, in that capacity, demanded payment to himself of the rent due from Mrs. Shipwick to Grunden. The lady declined to pay the assignee, whereupon the latter distrained her goods for the rent. He did not actually remove, or even lay hands upon the goods, but only declared that he seized them by way of distress and delivered to Mrs. Shipwick a written notice to that effect. She then paid Blanchard £5 for rent and 40s. for the expenses of the distress, and so redeemed her property. Afterward she brought this action of trover against the assignee, in which it was necessary for her to establish, first, that the defendant, being illegally appointed assignee, was not entitled to demand Grunden's rent; and, second, that the seizure of the goods, though without manual appropriation, constituted a conversion.

Both points were resolved in favor of the plaintiff. Although the argument of Chambre and Holroyd, counsel for the defendant, is cited in Foulkes vs. Willoughby as a correct statement of the law, they did not prevail. The court held that the defendant was not the legal assignee of Grunden, because the debt of the petitioning creditor did not accrue until after the act of bankruptcy, wherefore that creditor was not entitled to avail himself of Grunden's delinquency so as to demand the issue of a commission. It was also held that the act of obliging the plaintiff to redeem her goods from an unlawful distress was sufficient to constitute a conversion, the doctrine adopted by the court being thus stated in the argument of Law, afterwards LORD ELLENBOROUGH, counsel for the plaintiff: "The fact of obliging the plaintiff to advance money in order to redeem her goods from a wrongful distress amounts in law to a sale, which is a conversion. * * * The extorting of 40s. by virtue of having possessed himself tortiously of the goods under a pretended legal right is of itself a conversion. There is no occasion for a party to take possession of goods by laying his hands upon them; if he claim and assert a dominion over them, especially by turning the possession of them to his own profit, that is a clear possession in law to subject the wrongdoer to an action of trover."

Simmons vs. Lillystone, 8 Exchequer, 431 (1853).

The plaintiff was a maker of masts, oars and other articles of marine carpentry, and occupied a piece of land abutting upon the Thames. The defendant occupied a neighboring lot, which also abutted upon the river, and a portion of which was flooded by the stream at high tide. Certain spars and other pieces of timber belonging to the plaintiff had in some way gotten upon the defendant's land, and had become embedded in the soil. The defendant, having undertaken to dig a sawpit upon his premises, found these timbers occupying the site of the proposed excavation, and therefore sawed through them, leaving the pieces where they were. Some of the pieces were afterwards submerged by the tide and carried away by the river. Simmons, assuming that the cutting of his timbers amounted to a conversion thereof, sued Lillystone in trover. *Held,* that the action of the latter did not constitute a conversion of the plaintiff's property.

PARKE, B.: Now the evidence was that the pieces of timber were cut in two by the defendant; that they were left embedded in the soil—not applied to the defendant's own use;—and that part of them was carried away by the tide. Without adverting to the plea of justification, we are all of opinion that there was no sufficient evidence of conversion to entitle the plaintiff to a verdict upon the plea of not guilty. In order to constitute a conversion, there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it. If the entire article is destroyed, as for instance by burning it, that would be a taking of the property from the plaintiff and depriving him of it, although the defendant might not be considered as appropriating it to his own use. In this case, nothing is done but cutting the timber, and, by accident, it is washed away by the river—not purposely thrown by the defendant to be washed away;—consequently, we think that does not amount to a conversion. Assuming that it was *prima facie* a conversion, then the question would arise, whether that conversion was not excused by the right which the defendant had to make the sawpit, and to cut the timber in making it, if he was not able to do it in any other way. But, without deciding that, we think there was no evidence to warrant the jury in finding that this timber was converted by the defendant to his own use, that is, either by taking the whole property to himself, or asserting title in another, or depriving the plaintiff of the property.

Loring vs. Mulcahy, 3 Allen, 575. Massachusetts (1862).

Some persons who had stolen certain goods of the plaintiff left the same at the defendant's house for sometime, and afterwards, with the consent of the defendant carried them away. There was some evidence that the defendant knew that the goods had been stolen. The plaintiff sued in trover, conceiving that the re-delivery of the goods by the defendant to his bailors constituted a conversion; and the trial court charged the jury that, if the defendant knew that the goods had been stolen, the return thereof to the depositors would be a conversion. The plaintiff obtained a verdict; but the Supreme Judicial Court held that the instruction stated was erroneous.

METCALF, J.: The defendant did not convert the goods to his own use, but was a mere depositary thereof—a naked bailee. He did not assume to dispose of them as if they were his own, nor did he withhold them from the plaintiff on his demand. *Non constat* that he would not readily have restored them to the plaintiff if he had been required so to do. It does not appear that he had any intention to conceal the property from the owner, or that he made any agreement with the bailors to secrete it. In Simmons vs. Lillystone, BARON PARKE says: "In order to constitute a conversion, there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it. * * * If, on the evidence in this case, and the instructions given to the jury, the defendant was rightly found guilty of converting the goods to his own use, then would an innkeeper, who should receive into his stable a horse that he knew to be stolen, and should permit the person who brought him there to take him away, be guilty of converting the horse to his own use.

Frome vs. Dennis, 45 N. J. Law, 515. New Jersey (1883).

In August, 1879, the plaintiff left his plow on the farm of one Cummins, with the latter's consent, until he, the plaintiff, should come and take it away. In April, 1880, the farm passed into the possession of one Hibler, the plow being still there. In June, 1880, the defendant, a neighboring farmer, borrowed the plow of Hibler to plow a field, supposing the plow to be Hibler's, and, having used it, in three or four days returned it to Hibler, still supposing it to be his property. In the summer of 1881 the plaintiff informed the defendant that it was his plow which he had used, and demanded of him pay for the use,

and the return of the plow or its value; and, the defendant not complying, the plaintiff brought an action of trover for the plow. The justice before whom the suit was instituted, and the common pleas on appeal, each gave judgment for the plaintiff for the value of the plow. The judgment of the common pleas was reversed, the Supreme Court holding that the acts of the defendant did not constitute a conversion of the plow.

DIXON, J.: In this contention we agree with the defendant. In order to maintain an action of trover, it is necessary to prove an act of conversion by the defendant of the plaintiff's property. What will constitute a conversion is, I think, well summed up by MR. JUSTICE DEPUE in Woodside vs. Adams, 40 N. J. Law, 417, in these words: "To constitute a conversion of goods, there must be some repudiation by the defendant of the owner's right, or some exercise of dominion over them by him inconsistent with such right, or some act done which has the effect of destroying or changing the quality of the chattel." * * *

It is apparent, I think, from a perusal of these judgments, that every judge based his opinion of the defendant's guilt on the question whether he had done any act which amounted to a repudiation of the plaintiff's title, or to an exercise of dominion, *i. e.*, ownership, over the goods. Less than this would constitute a trespass, but not a conversion, so long as the character of the chattels remained unchanged. * * * In the light of these authorities, the conduct of the defendant in the case at bar did not amount to a conversion of the plow. He received it for temporary use only, and without any claim of right or dominion over it, but having a mere license from the possessor, revocable at once by either the possessor or the true owner. He surrendered it to the possessor, from whom he had received it, without any intention of enlarging or changing his title, without any reference to anybody's title, and doubtless would have as readily surrendered to the plaintiff upon his ownership being shown. Neither in the use nor in the surrender by the defendant does there appear any repudiation of the owner's right or an exercise of dominion inconsistent with such right. His acts may have constituted a trespass, but not a conversion. This being so, his subsequent failure to deliver the plow to the plaintiff on demand was no evidence of a conversion, for the reason that delivery was then impossible to him. He did not refuse to deliver, but could not. Ross vs. Johnson, 5 Burrows, 2825; Bank vs. Wheeler, 48 N. Y. 492; 8 Am. Rep. 564; Magnin vs. Dinsmore, 70 N. Y. 410; 26 Am. Rep. 608.

Mulgrave vs. Ogden, Croke's Elizabeth, 219. Queen's Bench (1591).

Action sur trover of twenty barrels of butter; and counts that he [deft.] *tam negligenter custodivit* that they became of little value. Upon this it was demurred, and held by all the justices

that no action upon the case lieth in this case; for no law compelleth him that finds a thing to keep it safely; as if a man finds a garment and suffers it to be motheaten; or if one find a horse and giveth it no sustenance; but, if a man find a thing and useth it, he is answerable, for it is conversion; so if he of purpose misuseth it, as if one finds paper and puts it into the water, etc.; but for negligent keeping no law punisheth him.

Rushworth vs. Taylor, 3 Q. B. 699 (1842).

The plaintiff put a gun belonging to him into the hands of one Cross to be sold. Cross lent the gun to one Todd, and Todd lent it to the defendant. Taylor overcharged the gun so that it burst. The plaintiff then wrote to the defendant demanding that he return to Rushworth the gun "in the same good plight and condition as the said gun was in at the time you received the same." Taylor refused to pay for repairing the gun, and afterwards returned it to Todd, who took it to a gunsmith. The gun had not been returned to the plaintiff when he brought this action against Taylor.

Held, that Taylor's refusal to deliver the gun, on the terms prescribed by the plaintiff's letter, was not a conversion.

Title Requisite.

Armory vs. Delamirie, 1 Strange, 503. Nisi Prius (1722).

The plaintiff was a chimney sweeper's boy, the defendant a jeweller. The boy, having found a jewel, took it to the defendant to find what it was worth. The defendant handed the jewel to his apprentice, who took out the stones, pretended to weigh them, and reported to his master that the value was three halfpence. This sum was offered to the boy, but he refused to accept it and demanded the jewel. That being refused, he brought an action of trover against the jeweller for the value of the property. The defence was that the plaintiff had no title to the jewel, which manifestly belonged to some one else. But the boy was allowed to recover, it being held:

1. That the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover.

2. That the action well lay against the master, who gives a credit to his apprentice, and is answerable for his neglect.

3. As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the CHIEF JUSTICE directed the jury that, unless the defendant did produce the jewel and shew it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels their measure of damages: which they accordingly did.

Gordon vs. Harper, 7 Term Reports, 9. King's Bench (1796).

Gordon had brought a quantity of household goods from one Borrett, had placed them in a house of his own, and had then leased the house and furniture together to one Biscoe for a certain term. Before these occurrences, one Broomhead had obtained a judgment against Borrett, and he conceived that Borrett's sale of the goods to Gordon was void as being in fraud of the rights of Borrett's creditors. Broomhead issued a writ of *fieri facias* upon his judgment, and directed the sheriff, Harper, to levy the writ upon the furniture purchased by Gordon. Accordingly, during the term for which the goods had been let to Biscoe, and whilst Biscoe was in possession thereof under the lease of the furnished house, Harper took the furniture, and sold it, in execution of Broomhead's writ. Gordon thereupon brought this action in trover against Harper.

Held, that Gordon could not maintain trover because, at the time of the taking he had neither the possession nor the right to take possession of the goods, having disentitled himself to both the possession and the right to possess by leasing the property for a definite period.

LORD KENYON, C. J.: The only point for the consideration of the court in Ward vs. Macauley [4 T. R. 489; *supra.*] was, whether in a case like the present the landlord could maintain an action of *trespass* against the sheriff for seizing goods, let with a house, under an execution against the tenant; and it was properly decided that no such action could be maintained. What was said further by me in that case, that trover was the proper remedy, was an extra-judicial opinion, to which,

upon further consideration, I can not subscribe. The true question is, whether, when a person has leased goods in a house to another for a certain time, whereby he parts with the right of possession during the term to the tenant, he can, notwithstanding, recover the value of the whole property pending the existence of the term in an action of trover. The very statement of the proposition affords an answer to it. If, instead of household goods, the goods here taken had been machines used in manufacture, which had been leased to a tenant, no doubt could have been made but that the sheriff might have seized them under an execution against the tenant, and the creditor would have been entitled to the beneficial use of the property during the term; the difference of the goods, then, can not vary the law. The cases which have been put at the bar do not apply; the one on which the greatest stress was laid was that of a tenant for years of land whereon timber is cut down, in which case it was truly said that the owner of the inheritance might maintain trover for such timber, notwithstanding the lease. But it must be remembered that the only right of the tenant is to the shade of the tree when growing, and, by the very act of felling it, his right is absolutely determined; and then the property does not vest in the immediate landlord; for, if he has only an estate for life, it will go over to the owner of the inheritance. Here, however, the tenant's right of possession during the term can not be divested by any wrongful act, nor can it thereby be revested in the landlord. I forbear to deliver any opinion as to what remedy the landlord has in this case, not being at present called upon to do so; but it is clear that he can not maintain trover.

GROSE, J.: The only question is, whether trover will lie where the plaintiff had neither the actual possession of the goods taken at the time, nor the right of possession. The common form of pleading in such an action is decisive against him; for he declares that, being possessed, etc., he lost the goods; he is therefore bound to show either an actual or a virtual possession. If he had a right to the possession, it [possession] is implied by the law. Where goods are delivered to a carrier, the owner has still a right of possession as against a tortfeasor, and the carrier is no more than his servant. But here it is clear that the plaintiff had no right of possession; and he would be a trespasser if he took the goods from the tenant; then by what authority can he recover them from any other person during the term?

Much stress has been laid upon what was said in Ward vs. Macauley. But the only question there was, whether *trespass* would lie under these circumstances and it was not necessary to determine how far trover might be maintained. It appears now very clearly, upon examining that point, that trover will not lie in any case, unless the property converted was in the actual or implied rightful possession of the plaintiff. In this case the plaintiff had neither the one nor the other pending the demise, and, when that is determined, perhaps he may have his goods restored to him again in the same state in which they now are, when it will appear that he has not sustained that damage which he now seeks to recover in this action.

Evidence of Conversion.

Baldwin vs. Cole, 6 Modern, 212. Nisi Prius (1704).

The plaintiff, a carpenter, sent his servant to work at the navy yard. The servant after some time quit the work and desired to take away his master's tools which he had brought with him. There was, however, a usage in the yard to detain the tools of the workmen until the work upon which they were employed was completed. Accordingly, the defendant, who was an officer connected with the yard, refused to let the servant take the plaintiff's tools. The plaintiff demanded the tools and the defendant refused him. Afterwards the defendant changed his mind and tendered the tools to the plaintiff; but the latter then declined to receive them and brought this action in trover, alleging a conversion.

Held, that the defendant's denial of the tools constituted a conversion.

LORD HOLT, C. J.: The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden*; for what is a conversion but an assuming upon one's self the property and right of disposing of another's goods, and he that takes upon himself to detain another's goods from him, without cause, takes upon himself the right of disposing of them; so the taking and carrying away another man's goods is a conversion; so if one come into my close and take my horse and ride him, there it is conversion; and here, if the plaintiff had received them upon the tender, notwithstanding the action would have lain upon the former conversion, and the having of the goods after would go only in mitigation of damages.

Wilton vs. Girdlestone, 5 B. & Ald. 847. King's Bench (1822).

The defendant was an attorney, and in his hands the plaintiff had placed certain deeds some time before Michaelmas term, which com-

*Concerning LORD HOLT'S definition of conversion, as here stated, Mr. Henry Wharton remarks: "No more succinct, accurate, or intelligible definition of the term can probably be found, though, strangely enough, its application in the particular case was plainly wrong, and has been often overruled": note to Burroughes vs. Bayne, 5 H. & N. 296.

"The bare denial to deliver is not always a conversion: as in Thimblethorpe's case, cited in 2 Bulstrode, 310, 314, where a piece of timber was left upon the land of the defendant by the lessee at the expiration of his term, and he was requested to deliver it, and refused, but suffered the timber to lie without intermeddling with it. The reason why this was held not to be a conversion was that there was no act done or dominion exercised": Bristol vs. Burt, 7 Johns. 254.

menced on October 9th. Demand for the deeds was made on November 29th, when the defendant refused to return them. There was no other evidence on the point. The plaintiff obtained a verdict.

Per Curiam: A demand and refusal is evidence of a prior conversion; and, as the deeds were in the defendant's hands prior to Michaelmas term, there was evidence for the jury of a conversion before that period, and they have found the fact to be so. New trial refused.

Burroughes vs. Bayne, 5 H. & N. 296. Exchequer (1860).

Burroughes owned a billard-table which he hired to one Filmer, who kept a hotel, under an agreement for the payment of a fixed rent, with a provision that Filmer might, if he chose, buy the table at a certain price. After Filmer had been in possession of the table for about two years, he sold his hotel and the furniture therein to the defendant, the bill of sale including the table. The plaintiff demanded the table of Bayne's agent who was in possession of the goods bought from Filmer, and who declined to surrender the table. Burroughes then made a formal demand upon Bayne, who looked at the agreement under which Filmer had gotten possession, and said that, "if it was a hiring only, he would give up the table, but it appeared to be a purchase. The table was in the inventory; and, unless the plaintiff could prove it was his, he would stick to it." On the same occasion Bayne asked for a copy of the agreement to show to his attorney, but the plaintiff refused to allow a copy to be taken. Burroughes then served notices upon the defendant and upon the man in possession of the goods that he, Burroughes, should call for the table on the next morning. Bayne testified at the trial that he had instructed the man to surrender the table. On the next day, when the plaintiff called at the hotel and demanded the table, the man in charge told him that he might have the table but that the key to the room in which the table was kept could not be found. Afterwards the table was seized and sold by the landlord under a distress for rent.

The plaintiff thereupon brought this action, alleging conversion of the table. Upon evidence of the facts just stated, Baron Bramwell, who presided at the trial, left it to the jury to say

whether there was a conversion. The verdict was for the plaintiff, with which the judge reported himself dissatisfied. But a motion for a new trial was overruled by three of the judges of the Exchequer, Bramwell dissenting on the ground that the action of the defendant did not amount to conversion but to no more than a qualified refusal.

BARON BRAMWELL'S opinion, though it did not prevail in this case, is set out below as having a value with relation to the subject generally.

MARTIN, B.: I myself have always understood that trover was the action whereby a person entitled to the possession of goods wrongfully detained from him was entitled by law to recover damages for their detention. I do not think there is any necessity to discuss the original meaning of the words *trover* or *conversion;* they are technical expressions used in an action given by the law to enable a man to recover damages for the unlawful detention of his property. I freely admit that the word *conversion* is an unfortunate expression. Undoubtedly, in the great majority of cases where an action of trover is brought, no conversion, in one sense, has taken place; the goods are in the same state in which they always were; there is no actual conversion in the sense in which a person not a lawyer might possibly understand the term. * * * But the word *conversion*, by a long course of practice, has acquired a technical meaning. It means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them.

CHANNELL, B.: I desire it to be understood that I do not mean to state or suggest that every detention is a conversion; I guard myself against any such supposition. Every asportation is not a conversion; and therefore it seems to me that every detention can not be a conversion. If it were, the mere removal of a chattel, independently of any claim over it in favor of the party himself, or of any one else whatever, would be a conversion. The asportation of a chattel for the use of the defendant or third persons amounts to a conversion, and for this reason, whatever act is done inconsistent with the dominion of the owner of a chattel, at all times and places over that chattel, is a conversion. On the other hand, the simple asportation of a chattel, without any intention of having further use of it, though it may be a sufficient foundation for the action of trespass, is not sufficient to establish a conversion. I apply to the case of detention somewhat the same rule as was laid down in Fouldes vs. Willoughby with reference to a mere asportation.

BRAMWELL, B., dissenting: I think if anything were necessary to show the impolicy of this form of action, and of using words in any other than their primary signification, it would be the difference of opinion which has arisen as to the meaning of the term conversion. It

seems to me that, after all, no one can undertake to define what a conversion is. Some decided cases may enable one to come to a conclusion, but in cases not similar there will always be a difficulty. . . .

It certainly is not every detention of goods (although there is no right to detain them) that is a conversion, in my judgment at all events. PARKE, B., in Clark vs. Chamberlain, 2 M. & W. 78, said: "If instead of insisting upon salvage being paid, the defendant had said, 'I do not know whether salvage is due or not; I shall keep them until that is ascertained,' he would not have been guilty of a conversion." In such cases it would be monstrous to hold that a man had not a right to make reasonable inquiries. It can not be that, if I pick up a watch in the street, and another persons says, "that is mine," I am bound at once to deliver it up. I may say, "It may be, but I will not give it up to you before you tell me the name of the maker"; and, if he thereupon walked away, it can not be that he would have a right of action against me simply because I exercised a sound discretion. If such were the law, I should be sorry for it; but I do not believe it is. The result is, you must in all cases look to see, not whether there has been a withholding of the property, but a withholding of it in such a way as that it may be said to be a conversion to a man's own use. I confess that there are some cases of a simple wrongful withholding which may, according to the construction put upon that word, be called a conversion to a man's own use; because, what matters it to one who may be the owner of the goods how or why he is deprived of them? If a person detains a sheep belonging to me, what matters it to me whether he does so because he means to eat it, and does eventually eat it, or makes any other use of it? He has claimed a dominion over it inconsistent with mine. Suppose a man detains a picture for the pleasure of looking at it, and in order that it may form one of the ornaments of his dining-room, and does nothing but let it hang there; that is to all intents and purposes a conversion, according to law and good sense.

Now, in the present case, the defendant got possession of the billiard table, not wrongfully, because it was let on hire by a person who had lawful possession of it, and who might hand it over to the defendant without the defendant being a trespasser or a wrongdoer therein. There was no suggestion that he got possession of it wrongfully, but, having got possession of it lawfully, and never having removed it from the place where it was originally placed, and, in truth, having nothing more than what might be called nominal possession of it, the plaintiff comes and says, "The billiard table is mine, give it to me." The defendant says, "Show me how it is yours; bring the contract of hiring." The contract of hiring is brought; the defendant sees a writing on the back of it, which tends to show it was a sale; and then asks for a copy, in order that he may take advice upon it; the plaintiff, instead of doing as he properly might have done, according to my view, says, "I shall not; the table is mine; you may give it me or not; but I shall treat it as a refusal." It turns out that he, himself, put the true color on the transaction by sending a formal notice and going the next morning for the billiard table, not treating it as an absolute refusal, but saying, "I

will come and take it away with the proper means for doing so." The next morning, when he did come, it unfortunately happened the defendant had given up nominal possession, and the person who had the actual custody had locked up the room, and the plaintiff could not get the table; he went away, and five or six days later the table was distrained for rent. It seems to me the more reasonable view of the case that this was not a conversion to the defendant's own use. . . . Therefore, on consideration of all the facts, had I been one of the jury, I should have found that there was not an assertion of dominion inconsistent with the title of the plaintiff; that the whole affair was a matter of discussion up to the time when the plaintiff was informed that the goods were at his service; and that, so far as the defendant was concerned, there clearly was no conversion.

Inability to Deliver.

Heald vs. Carey, 11 C. B. 977. Common Pleas (1852).

Carey was the London agent of a line of steamers plying between London and Dunkirk and connecting with the Northern Railway of France. Heald, being at Paris, directed his butler, Nisbett, to ship several cases of goods to London; and Nisbett shipped them, marked "Nisbett, Custom House, London Bridge." When the cases reached Dunkirk, one of them appeared to be damaged, and it was therefore, in accordance with a requirement of the French law, detained for an examination by an officer of the Tribunal de Commerce to ascertain the cause of the damage. The other cases went forward and were duly delivered to Nisbett in London. The company's agent at Dunkirk, after the necessary examination of the detained case, paid the charges accrued thereon and, not knowing Nisbett's address, shipped it by a bill of lading, deliverable to "Mr. Carey, to hold at the disposal of Mr. G. Nisbett, Custom House, London Bridge, or order." This case, upon its arrival in London, was not claimed by Nisbett within twenty-four hours, as was prescribed by a stipulation in the bill of lading; and Carey, meaning to protect the owner, paid the duty on the case, landed it, and sent it to a warehouse kept by one Barber. Afterwards Barber removed the case to another warehouse, and there, some days later, it was destroyed by an accidental fire.

Heald sued Carey in trover for value of the goods lost. The jury, upon evidence of the facts just stated, and in answer

to inquiries submitted by the court, found that the defendant had not been authorized to act as he did; that his object was not to do the best that he could for the consignee; and that he had not acted as would a prudent man intending best to protect the consignee. One of the jurors declared, "We think that the defendant had no right to meddle with the package. If he had taken no notice of it whatever, it would have gone to the Queen's warehouse, and been delivered up to the plaintiff when he or his agent applied for it." A verdict was accordingly rendered for the plaintiff.

On motion for a new trial or a non-suit, made by the defendant, *held,* that, notwithstanding the facts found by the jury, the defendant was not guilty of conversion.

MAULE, J.: The only question is, whether or not the defendant was guilty of a conversion. There is no doubt that a negligent dealing by a bailee with goods is not a conversion; and there is equally no doubt that a bailee is not liable for a conversion arising out of a negligent dealing with the goods by him, but which is not an act participated in by him. He may be liable to an action of another description, but not to an action of trover, which lies only where some dominion is asserted by the defendant over the chattel which is the subject of the action. One who takes possession of goods unlawfully, which are in consequence lost to the owner, is to a certain extent guilty of a conversion. But where, as is the case here, there is no unlawful taking of possession, or assertion of dominion over the goods, although the goods may be destroyed, there is no conversion, unless the bailee is a participator in the act which causes their destruction.

Williams vs. Gesse, 3 Bingham, N. C. 849. Common Pleas (1837).

Gesse kept a public house and was accustomed to receive parcels for the carriers who called there. Williams deposited a box of clothing in the defendant's kitchen, to be left until called for. A sister of Williams, at or about the same time, left a box of her goods. When Williams called for his box, the defendant said, "I suppose it's behind the settle"; but the box was not there and could not be found. When Miss Williams came for her goods, the box proved to be missing; and the landlord's wife said to her, "My husband has sent it no doubt by Croft, the carrier; he has a bad memory; it's a pity you did not speak to me." Williams and his sister, in separate actions, sued Gesse for conversion of their respective goods. *Held,* that the facts afforded no evidence of conversion in either case. On behalf of the sister it was argued that

what was said by the defendant's wife tended to prove that he had meddled with the goods.

Sed per Curiam: What was there to go to the jury? Was there anything but negligence? That will not support the action.

Qualified Refusal.

Alexander vs. Southey, 5 B. & Ald. 247. King's Bench (1821).

The plaintiff having insured certain goods in his house, and there having been a fire in the house, the insurance company removed the goods and deposited them in a warehouse. The defendant, a servant of the company, was placed in custody of the goods, having the key to the room in which they were stored. Of him the plaintiff demanded his property. The defendant said that he could not deliver the goods without an order from the insurance office. The plaintiff sued the servant in trover, and, at the trial, it was left to the jury to say whether the qualification of the defendant's refusal was a reasonable one, the judge telling them that, if so, there was not sufficient evidence of conversion. After a verdict for the defendant, *held,* that the direction given to the jury was correct.

ABBOTT, C. J.: Perkins vs. Smith [1 Wilson, 328] and Stephens vs. Elwall [4 M. & S. 260,] were both cases of actual conversion by servants in disposing of goods, the property of others, to their masters' use; but here the question is, whether the refusal of the servant to deliver the goods in question amounts to a conversion of the property. This, therefore, is the case of a conversion arising by construction of law. I think the refusal in this case, not being an absolute refusal, was not sufficient evidence of a conversion, and that the learned judge was right in so considering it.

BAYLEY, J.: Here the defendant had the goods in his possession as the agent of the insurance company, and he would not have done his duty if he had given them up without an application to his employers. He only gave, as it seems to me, a qualified, reasonable and justifiable refusal.

BEST, J.: An unqualified refusal is almost always conclusive evidence of a conversion; but, if there be a qualification annexed to it, the question then is, whether it be a reasonable one. Here the jury thought the qualification a reasonable one, and that the refusal did not amount to a conversion of the property, and I think they were right in that conclusion.

Vaughan vs. Watt, 6 M. & W. 492. Exchequer (1840).

The defendant was a pawnbroker, with whom some goods were pledged by a servant in the name of her mistress, which the defendant understood to be Mrs. Warne, but which was Mrs. Vaughan. On the next day Mrs. Vaughan, who was unknown to the defendant, sent to him a message that she had lost the duplicate and requested the issue of another. Watt sent her the necessary form of declaration. A few days later Mr. Vaughan appeared with the proper duplicate and demanded to redeem the goods. Watt declined to give them up on the ground that there was another duplicate outstanding. In an action of trover brought by Mrs. Vaughan, *held*, that it should be left to the jury to say whether the refusal of the defendant was reasonable under the circumstances.

PARKE, B.: It was a question for the jury, whether the defendant meant to apply them to his own use, or assert the title of a third party to them, or whether he only meant to keep them in order to ascertain the title to them, and clear up the doubts he then entertained on the subject, and whether a reasonable time for doing so had not elapsed, without which it would not be a conversion.

Green vs. Dunn, 3 Campbell, 215. Nisi Prius (1811).

The defendant, coming into the possession of certain premises, found there some timber, belonging to the plaintiff, which had been left there by permission of the former occupant. The plaintiff demanded the timber, and the defendant said to him: "If you will bring anyone to prove it is your property, I will give it to you, and not else." The plaintiff, instead of doing as was suggested, brought an action of trover for the timber. *Held*, there was no proof of conversion.

LORD ELLENBOROUGH, C. J.: This is a qualified refusal, and no evidence of conversion.

Jus Tertii.

Thorne vs. Tilbury, 3 H. & N. 534. Exchequer (1858).

One P. F. Thorne having died, his household goods and other effects were collected by the plaintiff, a relative, who was entitled to become the administrator, but did not do so, and who deposited the goods for temporary storage in the warehouse of the defendants. Afterwards, one Huxham was appointed administrator of the decedent, and in that capacity notified the defendants of his title to the goods stored with them, and warned them not to surrender the property to the surviving Thorne. The latter, however, demanded the return to himself of the articles; which being refused, he brought an action of

trover against the warehousemen. The defendants pleaded the facts as they have been stated; and on demurrer the plea was held good.

MARTIN, B.: It is absurd to say that, because the defendant took the goods from the plaintiff, he cannot deliver them up to the true owner but must be liable to two persons.

WATSON, B.: Though the plaintiff has not as good title as against the administrator, he had as against all the rest of the world, and he might have taken out administration, and so perfected his title. But another person did that which defeated his title. The present plaintiff claims to recover by reason of an estoppel. Now, if he is right, the defendant could not call upon him to interplead with the rightful administrator, either at law or in equity, but the plaintiff must recover the full value. The rightful administrator would also be entitled to recover the full value against the defendant. However, without any astute argument, it is clear that the defendant must be at liberty to show that the plaintiff had a defeasible title, and that such title had been defeated.

Webb vs. Fox, 7 T. R. 392. King's Bench (1798).

Webb had become a bankrupt, whereby his whole estate was vested in his assignees. After the assignment, however, he acquired a quantity of merchandise, which in some way came into the possession of Fox and his partner. These goods those persons declined to restore to Webb, who brought this action of trover. The defendants pleaded that Webb was a bankrupt and that all his assets were the property of his assignees; and it was argued that, since the plaintiff had not legal title to the goods, the defendants were justified in their refusal by showing title in third persons. But the court held, in effect, that the title of the assignees, not being asserted by them, could not be invoked by the defendants against Webb. LORD KENYON, in his opinion, distinguished the case from one of ejectment for real property, where the plaintiff must show a complete legal title in himself.

LORD KENYON, C. J.: The immediate right to real property must be vested in one person only; whereas a special property in the case of personalty may be in one, as in the case of carriers, while the absolute right to it may exist in another. When a competition arises between those two persons, the right of the latter must prevail; but as against all other persons, a special property is sufficient. Now here it seems to be admitted that an uncertificated bankrupt may go to market with goods in his possession and transfer the property to any other person; then

he must have in some degree a special property in them against everyone but his assignee. * * * Therefore, on principle, and without adverting to the authorities, I am of opinion that nobody has a right to take this property from the bankrupt but those who regularly claim under the commission.

LAWRENCE, J.: In order to maintain an action of trover, it is necessary that the plaintiff should have either the absolute or a special property in the goods that are the subject of the action; he need not have both: either the one or the other is sufficient. Absolute property is where one, having the possession of chattels, has also the exclusive right to enjoy them, and which can be defeated only by some act of his own. Special property is where he who has the possession holds them subject to the claims of other persons. There may be special property in various instances. There may be special property without possession; or there may be special property arising simply out of lawful possession, and which ceases when the true owner appears. Such was the case of Armory vs. Delamirie, 1 Str. 504, where a chimney-sweeper's boy, having found a jewel, carried it to a goldsmith to know what it was, who refused to return it; and it was holden that, though the plaintiff did not, by such finding, acquire an absolute property, yet he had such property as would enable him to keep it against all but the rightful owner, and consequently that he might maintain trover for it against the goldsmith, who was a wrongdoer. Now that appears to me to go the whole length of deciding this case.

Biddle vs. Bond, 6 B. & S. 222. Queen's Bench (1865).

One Robbins was in occupation of a house which he had bought from Biddle, and for which he was to pay by certain periodical installments. The agreed payments not having been regularly made, Biddle erroneously conceived the notion that he was entitled to distrain the goods of Robbins as for rent, and accordingly seized divers articles to the value of about £45 by way of distress. These goods Biddle delivered to Bond, an auctioneer, to be sold, as would have been proper had the relation of landlord and tenant existed between Biddle and Robbins. Before the sale Robbins notified the auctioneer that the purported distress was void, and warned him not to sell the goods, or, if he should sell them, to retain the proceeds for him, Robbins. Bond sold the goods, but refused to pay the proceeds to Biddle. At the time of the trial the money had not been paid to Robbins; but it appeared that Bond withheld the proceeds of the sale from Biddle by the authority, and in reliance upon the right, of Robbins. Biddle now sued Bond for

the money; and the question was, whether the defendant could set up the title of Robbins against the plaintiff, from whom the defendant had received the goods.

Held, that the command of Robbins, who was rightfully entitled to the property and to the money arising therefrom, was an available defence.

BLACKBURN, J.: We do not question the general rule, that one who has received property from another as his bailee or agent or servant must restore or account for that property to him from whom he received it; and we agree with what is said by my brother MARTIN in Cheesman vs. Exall, 6 Exch. 341, 346, that "there are numerous cases in connection with wharfs and docks in which, if the party entrusted with property were not estopped from denying the title of the person from whom he received it, it would be difficult to transact commercial business." But the bailee has no better title than the bailor; and, consequently, if a person entitled as against the bailor to the property claims it, the bailee has no defence against him; Wilson vs. Anderton, 1 B. & Ad. 450. Such was the position of the defendant in the present case. If Robbins had chosen to sue him in trover, or waiving the tort, had sued for money had and received, the defendant would have had no defence. He was therefore compelled to yield to Robbins' claim, and it would certainly be a hardship on him if, without any fault of his own, the law left him without any defence against the plaintiff for so yielding. We do not, however, think that such is the law. * * *

The position of an ordinary bailee, where there has been no special contract or representation on his part, is very analogous to that of a tenant, who, having accepted the possession of land from another, is estopped from denying his landlord's title, but whose estoppel ceases when he is evicted by title paramount. This was decided as early as the 44 Eliz. [A. D. 1602] in Shelbury vs. Scotsford, Yelverton, 22. There the plaintiff sued in assumpsit against the bailee of a horse for the breach of his contract to redeliver it. The defendant pleaded that J. S., the owner of the horse, took it from him. After verdict for the defendant, the plaintiff moved in arrest of judgment; "but by Fenner and Yelverton *contra;* for the matter alleged by the defendant does in law discharge the promise by reason of the former property of the horse in J. S.; and then it is an eviction of the horse out of the defendant's possession, which discharges the promise, as well as an eviction of the lessee for years discharges all rents, bonds, and covenants in any sort depending upon the interest." In Wilson vs. Anderton, 1 B. & Ad. 450, 457, LITTLEDALE, J., without referring to Shelbury vs. Scotsford, but evidently having it in his mind, states the law to the same effect. And accordingly in Hardman vs. Wilcock [note to 9 Bing. 382], in Cheesman vs. Exall [6 Exch. 341], and in Sheridan vs. The New Quay Company [4 C. B. N. S. 618], a bailee was permitted under circumstances similar to the present to set up the *jus tertii.* It is true that the two first of these cases the plaintiff had obtained the goods by fraud upon the

person whose title was set up, whilst in the present case there is nothing in the evidence to show that the plaintiff, though a wrongdoer, did not honestly believe that he had the right to distrain. But we do not think that this circumstance alters the law on the subject. The position of the bailee is precisely the same whether the bailor was honestly mistaken as to the rights of the third person or fraudulently acting in derogation of them. We think that the true ground on which a bailee may set up the *jus tertii* is that indicated in Shelbury vs. Scotsford, viz, that the estoppel ceases when the bailment on which it is founded is determined by what is equivalent to an eviction by title paramount.

It is not enough that the bailee has become aware of the title of a third person. We agree in what is said in Betteley vs. Reed, 4 Q. B. 511, that "to allow a depositary of goods or money, who has acknowledged the title of one person, to set up the title of another, who makes no claim or has abandoned all claim, would enable the depositary to keep for himself that to which he does not pretend to have any title in himself whatsoever." Nor is it enough that an adverse claim is made upon him so that he may be entitled to relief by interpleader. We assent to what is said by POLLOCK, C. B., in Thorne vs. Tilbury, 3 H. & N. 534, 537, that a bailee can set up the title of another only "if he defends upon the right and title, and by the authority, of" that person. Thus restricted, we think the doctrine is supported both by principle and authority, and will not be found in practice to produce any inconvenient consequences.

The Idaho, 93 U. S. 575. Supreme Court of the United States (1876).

W. J. Porter & Co., at New Orleans, advanced to one Forbes a large sum of money upon a bill of lading which set forth the shipment of 140 bales of cotton in the brig C. C. Colson. The cotton, though not at the time in the Colson, was subsequently delivered at the pier at which the brig was lying. The bales, however, were never taken aboard the Colson, but were removed from the pier and were shipped, with 25 other bales added by Forbes, in the steamer Ladona to New York. Forbes took from the Ladona a single bill of lading covering the whole shipment of 165 bales; and on this bill he obtained a large advance of money from Schaefer & Co. of New York, to whom he assigned the bill. On arrival of the Ladona at New York, Schaefer, who had heard of frauds extensively practised at New Orleans, sent the 165 bales to a warehouse, and employed a man to obliterate the identifying marks. This was done by working all of the day, which was a Sunday. Schaefer had pre-

viously arranged for the shipment of the cotton by the steamer Idaho to Liverpool; and on the Monday following his alteration of the marks, he sent the 165 bales, together with 35 other bales belonging to him, to that vessel. A bill of lading was given by the Idaho, covering the whole quantity of 200 bales and running in favor of one Mann, a clerk of Schaefer's, to whom Schaefer had made a nominal sale of the goods. Mann assigned the bill of lading to Hentz & Co., who were told to ask no questions, and who gave their note for the price, and who afterwards paid the amount of the note to Mann upon Schaefer's guaranty against loss. Mann turned the money over to Schaefer, with a comparatively small deduction.

Mann had consigned the whole quantity of cotton shipped by Schaefer on the Idaho to Finlay and Co. of Liverpool. After the vessel arrived at Liverpool, 165 bales were claimed by Baring Brothers & Co. under an order from Porter & Co. of New Orleans. Although the bill of lading stipulated for the delivery of the entire shipment to Finlay & Co., the vessel delivered 165 bales to the Baring firm and the remaining 35 to Finlay & Co. The latter concern paid Hentz & Co. only for the 35 bales. Thereupon Hentz & Co. brought this suit in admiralty against the Idaho for the non-delivery of the 165 bales according to the terms of the bill of lading assigned to the libellants.

The defence was, that the 165 bales delivered to the Barings were the property of Porter & Co., and therefore rightfully subject in the hands of the carrier to the order of the New Orleans firm. The contention on the other side was that it is incompetent for a bailee to set up the *jus tertii* against the claim of the bailor.

Held, (1) that the vessel had connected herself with the title of the true owners, Porter & Co., and so was justified in refusing delivery to the shipper; and,

(2) that the fraudulent intermingling of the 140 bales of the Porter cotton with 25 other bales belonging to Forbes, and the alteration of the marks on all the bales so as to obscure the identity of the entire body of goods, had the effect to give Porter & Co. the right to the possession of the whole quantity.

STRONG, J.: In determining the merits of the defence set up in this case, it is necessary to inquire whether the law permits a common carrier to show, as an excuse for nondelivery pursuant to his bill of lading, that he has delivered the goods upon demand to the true owner. Upon this subject there has been much debate in courts of law, and some contrariety of decision.

In Rolle's Abr. 606, tit. Detinue, it is said, "If the bailee of goods deliver them to him who has a right to them, he is, notwithstanding, chargeable to the bailor, who in truth has no right"; and for this, 9 Henry VI 58 [A. D. 1430], is cited. And so, if the bailee deliver them to the bailor in such a case, he is said not to be chargeable to the true owner (*id.* 607), for which 7 Henry VI 22 [A. D. 1428] is cited. The reasons given for such a doctrine, however satisfactory they may have been when they were announced [*ca.* 1650], can hardly command assent now.

It is now everywhere held that, when the true owner has, by legal proceedings, compelled a delivery to himself of the goods bailed, such delivery is a complete justification for non-delivery according to the directions of the bailor. Bliven vs. Hudson River Railroad Co., 36 N. Y. 403. And so, when the bailee has actually delivered the property to the true owner, having a right to the possession, on his demand, it is a sufficient defence against the claim of the bailor. The decisions are numerous to this effect: King vs. Richards, 6 Wharton, 418; Bates vs. Stanton, 1 Duer, 79; Hardman vs. Wilcock, 9 Bingham, 382; Biddle vs. Bond, 6 Best & Smith, 225. If it be said that, by accepting the bailment, the bailee has estopped himself against questioning the right of his bailor, it may be remarked in answer that this is assuming what cannot be conceded. Undoubtedly the contract raises a strong presumption that the bailor is entitled; but it is not true that thereby the bailee conclusively admits the right of the principal. His contract is to do with the property committed to him what his principal has directed—to restore it or to account for it: Cheesman vs. Exall, 6 Exchequer, 641. And he does account for it when he has yielded it to the claim of one who has right paramount to that of his bailor. If there be any estoppel, it ceases when the bailment on which it is founded is determined by what is equivalent to eviction by title paramount; that is, by the reclamation of possession by the true owner: Biddle vs. Bond, *supra*.

Nor can it be maintained, as has been argued in the present case, that a carrier can excuse himself for failure to deliver to the order of the shipper only when the goods have been taken from his possession by legal proceedings, or where the shipper has obtained the goods by fraud from the true owner. It is true that, in some of the cases, fraud of the shipper has appeared; and it has sometimes been thought that it is only in such a case, or in a case where legal proceedings have interfered, that the bailee can set up the *jus tertii*. There is no substantial reason for the opinion. No matter whether the shipper has obtained the possession he gives to the carrier by fraud practised upon the true owner, or whether he mistakenly supposes he has rights to the property, his relation to his bailee is the same. He cannot confer rights which he

does not himself possess; and, if he cannot withhold possession from the true owner, one claiming under him cannot. The modern and best considered cases treat as a matter of no importance the question how the bailor acquired the possession he has delivered to his bailee, and adjudge that, if the bailee has delivered the property to one who had the right to it as the true owner, he may defend himself against any claim of his principal. * * *

We do not deny the rule, that a bailee cannot avail himself of the title of a third person, although that person be the true owner, for the purpose of keeping the property for himself, nor in any case where he has not yielded to a paramount title. If he could, he might keep for himself goods deposited with him, without any pretence of ownership. But if he has performed his legal duty by delivering the property to its true proprietor, at his demand, he is not answerable to the bailor. And there is no difference in this particular between a common carrier and other bailee. * * *

All that remains to be determined is whether Porter & Co. had a right to the possession of the additional 25 bales shipped with the 140 from New Orleans on the Ladona and shipped also on the Idaho for Liverpool, together with the 35 bales delivered there to Finlay & Co. When the 140 bales were removed from the custody of the Colson and taken to the Ladona, 25 other bales were mingled with them. On the pier opposite that vessel, they were remarked, and all shipped as one lot, under one bill of lading. When they reached New York, they came into the possession of Schaefer, the indorsee of the bill of lading given by the Ladona, who knew when he received them that the Colson was short eight hundred or a thousand bales. The newspapers had contained articles about the fraud. He himself was a sufferer. He held some of the fraudulent bills of lading of the Colson, and he had heard that Porter was in the same condition. So he has testified. With this knowledge, he set to work to guard against the possibility of tracing the cotton. He caused the Colson marks to be removed from the 140 bales, and the Ladona marks to be removed from the 140 and the 25 bales. He then had the whole lot remarked, making no distinction between the lot of 140 and that of 25, thus practically making the bales undistinguishable. In addition to this, by an arrangement between himself and Mann, his clerk, in the form of a sale, the cotton was shipped *en masse* by the Idaho. It is impossible for us to close our eyes upon the nature and purpose of this transaction. It was a perfect confusion of the 140 bales that belonged to Porter with the other 25; and it was not accidental. It was purposely made with an intent to embarrass or hinder the owner, and prevent him from recovering his original property. There is no conceivable purpose for Schaefer's obliterating the marks, both of the Colson and the Ladona shipment, in so much haste (ordering it done on Sunday), and substituting new marks, except to destroy the evidence of title in any other person. * * *

Now what must be the legal aspect of all this? What the effect of intermingling the 25 bales with the 140 that belonged to Porter in such a manner that they could not be distinguished, and so completely that

it is impossible for either party to identify any one of the 165 bales as a part of the lot of 25, or of the larger lot of 140 shipped on the Colson? We can come to no other conclusion than this: the right of possession of the whole was in Porter, and neither he who caused the confusion, nor any one claiming under him, is entitled to any bale that he cannot identify as one of the lot of 25. It is admitted, the general rule that governs cases of intermixture has many exceptions. It applies in no case where the goods remain capable of identification, nor where they are of the same quality or value; as where guineas are mingled, or grain of the same quality. Nor does the rule apply where the intermixture is accidental, or even intentional, if it be not wrongful. But all the authorities agree that, if a man willfully and wrongfully mixes his goods with those of another owner, so as to render them undistinguishable, he will not be entitled to his proportion, or any part, of the property. Certainly not, unless the goods of both owners are of the same quality and value. Such intermixture is a fraud. And so, if the wrongdoer confounds his own goods with goods which he suspects may belong to another, and does this with intent to mislead or deceive that other, and embarrass him in obtaining his right, the effect must be the same. Thus it was ruled in Ryder vs. Hathaway, 21 Pick. 306. Such is the present case. The confusion of the bales of cotton was not accidental. It was purposely made. The intermixture was evidently intended to render any identification of particular bales impracticable, and to cover them against the search of a suspected owner. It was therefore wrongful. And the bales were not of uniform value. They differed in weight and in grade. But even if they were of the same kind and value, the wronged party would have a right to the possession of the entire aggregate, leaving the wrongdoer to reclaim his own, if he can identify it, or to demand his proportional part. * * * It follows from all we have said that the delivery by the Idaho of the 165 bales to the order of Porter & Co. was justifiable, and that the libellants have sustained no legal injury.

DECEIT.

Elements of Deceit.

In order to maintain an action for deceit, the plaintiff must show:

1. That the defendant made a false representation concerning a material matter of fact;

2. That the defendant made such representation with knowledge, actual or imputed, that it was false;

3. That the defendant intended the representation to be acted upon;

4. That the plaintiff did not know the representation to be false but believed it to be true; and,

5. That the plaintiff, in reliance upon the representation, acted to his damage.

I. *The Representation.*

A.—**Manner of Making.** The representation may be made

1. By a direct statement, verbal or written: Pasley vs. Freeman, *infra,* p. 344.

2. By mere acts or conduct having the effect to imply a state of fact which does not exist and so produce a false impression; as by giving a worthless check, or selling goods which the vendor is not entitled to sell, or by speech or behavior which, while not directly asserting a matter of fact, creates a belief of the fact.

Tyssowski vs. Smith Co., *infra,* p. 358.

3. By suppression of the truth, as where facts are partially stated but some material facts are omitted. A person is not always, or generally, bound to communicate to those with whom he deals all the information that he has on the subject of the negotiation. But if he undertakes to represent facts bearing upon that subject, he must make a statement which is, not only truthful so far as it goes, but truthful in its general effect. If he omits matters which would put a different complexion upon

what is stated, so that the representation is misleading because of its incompleteness, the result is deceitful, the suppression of the truth being the suggestion of falsehood; as in

Atwood vs. Chapman, *infra,* p. 365.

So where the defendant wrote a letter recommending a merchant for credit, stating facts favorable to the merchant's reputation for solvency but omitting to mention that the writer held three judgments against him:

Allen vs. Addington, 7 Wendell, 9.

4. By concealment of the truth:

Stewart vs. Wyoming, &c., Co., *infra,* p. 356.

As where the defendant, in order to sell a house, plastered up and papered over defects in the walls: Pickering vs. Dawson, 4 Taunton, 779; or, in order to sell a ship, put her into water so that defects in the hull could not be discovered: Schneider vs. Heath, 3 Campbell, 506.

5. By silence, where it is a duty to speak.

Generally, and in the absence of some especial fiduciary relationship, one party to a transaction is not bound to tell all he knows to the other; and, if the latter party makes a bad bargain by reason of his ignorance, he cannot recover on account of the better knowledge possessed on the other side:

Laidlaw vs. Organ, *infra,* p. 359.

Although many decisions allude to situations in which mere silence is deceitful because the silent party is under some obligation to speak, it is rather difficult to discover concrete cases in which such a duty exists independently of some fiduciary relation, such as that of agency, trusteeship, attorneyship and the like. Some of the cases usually cited to this point, and in which a duty of disclosure is stated as abstractly possible, are cases which actually involved misleading conduct, positive concealment or other fraudulent contrivance, which are active forms of deceit different from the mere passivity involved in failure

to communicate some matter incident to the negotiation; this seems true of the Tyssowski case, of Atwood vs. Chapman, and of Stewart vs. Wyoming Company, cited *supra*. Of the few cases wherein simple silence has been held deceitful perhaps the clearest is

Hill vs. Gray, *infra*, p. 360.

In Evans vs. Edmonds, 13 C. B. 777, Evans had seduced the wife of Edmunds, and the woman and Evans agreed that she should arrange a separation from her husband so that their adulterous intercourse should be more feasible; Edmunds did not know these facts, but he found himself getting on so badly with his wife that he consented to the proposed separation, supposing her conjugal fidelity to be unimpaired; articles of separation were executed whereby Edmunds bound himself to pay a stated sum each month to Evans as trustee for Mrs. Edmunds, the husband having full confidence in the integrity and good faith of the trustee: in an action brought by Evans upon the articles, the facts appearing as here stated, it was held that the plaintiff was barred of recovery by the wrong involved in his deceitful conduct and fraudulent silence.

B.—**The Matter of Fact** which is the subject of an actionable misrepresentation must be some matter which is susceptible of ascertainment and positive knowledge, that is, matter of fact as distinguished from matter of opinion, judgment, intention or expectation.

Thus, the value of an article is a matter of opinion, but the price actually paid for it in a given sale is a matter of fact. Declarations as to the value of specific property cannot, therefore, be in general made the basis of an action for deceit; and it has been held (though the later decisions are otherwise), that even a false assertion as to the amount offered by a bidder for the property is not such a statement of fact as will warrant recovery by one who is thereby deceived, since to say that so much has been offered is no more than saying that somebody thinks the property worth so much: Van Epps vs. Harrison, *infra*, p. 354. But, as is held in that and in other cases, to say that so much has actually been paid for property is to state a matter of fact, for falsehood in which the declarant may be held liable. So the expression of one's reasons, motives or intentions with respect to a certain business has been held not capable of being a deceitful representation: Vernon vs. Keys,

4 Taunton, 488; S. C. 12 East, 632 [1810]; though SIR FREDERICK POLLOCK [1886], having regard to qualifications to be presently noticed, submits that this opinion "can no longer be considered law:" Pollock on Torts (Am. Ed.), 360. And, upon the same principle, a promise or the statement of one's expectation cannot, in general, be deemed an actionable deceit.

For like considerations it is well settled that a statement as to the law, being in its very nature, the statement of an opinion, is not a matter of which deceit can be predicated:

Upton vs. Trebilcock, 91 U. S. 45.

There are, however, as modern courts more and more frequently recognize, situations in which misrepresentations as to opinion, intention and the like subjective matters, are deceptions respecting material facts and are therefore actionable. "It is," said LORD JUSTICE BOWEN, "very difficult to prove what the state of a man's mind at a particular time is; but if it can be ascertained, it is as much a fact as anything else, as much a fact as the state of his digestion:" Edgington vs. Fitzmaurice, 29 Ch. D. 459 [1884]. A false statement of the declarant's belief or intention may be a very effectual means of deceiving where his opinion or purpose is regarded by the person addressed as a material or persuasive consideration. One who buys goods with the intention not to pay for them is guilty of a fraud: Donaldson vs. Farwell, 93 U. S. 631; and a false warranty may be available as a means of deception because it creates a belief in the warrantor's confident opinion upon the subject of the warranty.

Especially in cases where the declarant expressing his opinion, intention, motives or other like mental states has, or assumes to have, or may fairly be supposed to have, peculiar information or expertness with respect to the subject of his declaration, is his statement susceptible of being regarded as one of fact, and so of being regarded as an actionable deception. If a jeweller of high reputation puts a value upon a precious stone submitted for his appraisement, such an estimate is obviously something more than the vague conjecture of one not expert in such matters; and if the jeweller, in bad faith, states

a false valuation, the misrepresentation is less a matter of opinion than of fact, since in such a case the jeweller's opinion as to value is likely to be the very fact which is sought by the inquiry..

So an intentional misrepresentation concerning a matter of law may be, and is likely to be considered, more than an expression of mere opinion if made by a lawyer; and if it can be made to appear that a lawyer intentionally misstated his understanding of the law—and in a case involving some elementary and generally known principle such bad faith may be established—it is highly probable that his false expression of opinion would be actionable. This has been held in cases where the misstatement of the law has been made by persons well informed on the subject to those having less than the usual opportunities of knowing the law of the place; as where a recent immigrant was fraudulently misadvised as to the local law by one long resident in the State: Moreland vs. Atchison, 19 Texas, 303.

"A person named Collins, who was quite insolvent, had the impudence to arrest a Continental duke for an imaginary debt of £10,000. The Continental duke was incontinently frightened—probably he had heard that debtors in England were always ordered off to instant execution—and paid £500 for his release. He afterwards brought an action to recover the money, and was held entitled to do so": such is Mr. Shirley's statement, in his Leading Cases, p. 212, of the case of Cadaval vs. Collins, 4 Ad. & E. 858.

II. *The Knowledge of Falsity.*

The knowledge on the part of the defendant which will render him liable for deceit may be either actual knowledge that the representation made by him is false, or it may be knowledge imputable to him and held to be equivalent to actual knowledge of falsity in his statement. The various degrees and modes of knowledge which will make one responsible for an untrue statement may be defined as follows:

1. **Actual Knowledge** that what he says is untrue; as in Pasley vs. Freeman, *infra,* p. 344; or

2. **Recklessness,** as where one makes a statement without any knowledge at all on the subject, and having no reason to believe that what he says is either true or false:

Cooper vs. Schlesinger, *infra,* p. 352;
Chatham Co. vs. Moffatt, *infra,* p. 367;
Cahill vs. Applegate, 98 Md. 493.

Such recklessness in making an assertion without any knowledge or belief at all on the subject is esteemed to involve a fraudulent intention; and where it appears that the defendant has made a false statement without any information which would lead a reasonable man to suppose it to be true, a fraudulent purpose may be inferred:

Taylor vs. Ashton, 11 M. & W. 401.

MAULE, J.: I conceive that, if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril; and if it be done either with a view to secure some benefit to himself or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts: Evans vs. Edmonds, 13 C. B. 777 [1853].

3. **Extravagant Statement**—that is, a belief that the statement made is true, but a belief which is either not based upon reasonable grounds or is stated as positive knowledge when it is only a belief—is a form of deception diversely regarded in different jurisdictions.

(*a*) In England and in some of the American States, actual fraudulent intent is requisite to constitute an actionable deceit. If, therefore, the defendant sincerely believes what he said, though he may have been unduly credulous or grossly negligent in so believing, or though he may have been in his mode of statement positive beyond the degree warranted by his information, he is not, in those jurisdictions, liable for deceit:

Haycraft vs. Creasy, *infra,* p. 347;
Peek vs. Derry, *infra,* p. 361.

(*b*) In the United States generally it is held that the mere absence of fraudulent intent will not exculpate one who has made a false statement to the injury of another, but such person is liable if he has been grossly or otherwise culpably negligent in forming an erroneous belief or has stated such belief as based on positive knowledge when it was only a belief:

Browning vs. Bank, *infra*, p. 349;
Cooper vs. Schlesinger, *infra*, p. 352.

4. **Negligence** in circumstances which render it the duty of the declarant to know whether his statement is true or false is in some states held to be the equivalent of fraudulent falsehood: Bigelow, 88.

Thus, where the defendant was an officer of a private corporation and, as such officer, was bound to know the condition of the company's business and finances, it was held that misinformation on those subjects given by him, though he supposed his statements to be true, made him liable as for deceit:

Magruder vs. Montgomery, 33 App. D. C. 133.

So, where the defendant, honestly supposed that he was authorized to accept bills drawn upon another person, accepted such a bill, and the acceptance was repudiated by the drawee, the defendant was held liable for deceit:

Polhill vs. Walter, 3 B. & Ad. 114.

III. *The Intention.*

The defendant's intention that his false representation should be acted upon is not, necessarily, that the plaintiff or any other particular person should act upon it. The statement may be made to one person with the intention that it shall be communicated to a third person for the latter to act upon; as in Langridge vs. Levy, *infra*, p. 510. Or the statement may be given to the public for the purpose of inducing action by any one who may be persuaded to believe what is said; as by a prospectus inviting subscriptions for shares in a corporation:

Peek vs. Derry, *infra*, p. 361.

Or it may be of such a character and made in such circumstances that it is likely to be acted upon by somebody:
Pilmore vs. Hood, *infra*, p. 346.

Where, however, the statement is a mere private communication, not intended to be repeated or to be used for the guidance of any other than the person immediately addressed, the defendant cannot be held liable because some third person has learned of what he said and has acted thereon. The distinction is thus stated:

BRAMWELL, B.: It would be a strong thing to hold that, if a man makes a verbal untrue statement to any person, as, for instance, that shares in a particular company are a valuable security, if that person buys and recommends his friends to buy, he is liable to any one who buys on the faith of such representation. But it is not a bad rule, that a person who makes a fraudulent representation which is intended to be generally circulated, shall be liable to any person injured by acting upon it, however remote the consequence may be: Bedford vs. Bagshaw, 4 H. & N. 538.

IV. *The Belief of the Plaintiff.*

The plaintiff's belief that the representation was true must have been a not unreasonable belief: the plaintiff cannot recover because he has credited a statement manifestly absurd. The older cases generally, and to a certain extent the modern cases, hold that, where the means of knowledge are equally accessible to both the parties, the plaintiff cannot complain if he has relied upon assertions made by the defendant and has neglected to verify them. The doctrine now, however, tending more and more to prevail is that, if the defendant has been guilty of a fraudulent misstatement, he cannot successfully set up that the plaintiff was guilty of folly or negligence in believing him. Therefore, where the defendant, seeking to sell his place of business, declared that the receipts amounted to a certain sum, which was much in excess of the sum actually received, he was held liable to the vendee for a deceit, notwithstanding that the vendee might, by an examination of the books, have discovered the exaggeration: Dobell vs. Stevens, 3 B. & C. 623 [1825]. So, where the defendant negotiating a sale of his real property,

makes false representations concerning the title, the plaintiff may recover as for a deceit although he might, by an examination of the public records, have ascertained the true state of the title. The reluctance with which courts have come to allow recovery where the plaintiff has acted upon the defendant's false statement without verifying it, is well illustrated in

Van Epps vs. Harrison, *infra*, p. 354.

V. *The Plaintiff's Action.*

To say that the plaintiff acted in reliance upon the false representation means something more than acting with the belief that it was true. The plaintiff may have been deceived by the statement, and yet have acted in the transaction upon other grounds and without regard to what was said by the defendant; as where the defendant, seeking to sell a boat, made false statements as to her condition, but the plaintiff, instead of relying upon such representations, made an independent examination of the boat and bought her on his own judgment, in which case the defendant was held not liable for any misstatements that he had made:

Slaughter vs. Gerson, 13 Wall. 379.

So where the subject of sale was a mine:

Southern Development Co. vs. Silva, 125 U. S. 247.

In these cases the plaintiff may or may not have credited what was told him, but he acted in reliance, not upon that, but upon his own examination and judgment.

So the defendant will not be liable for a deceitful representation if it happens not to affect the plaintiff's conduct; as where the defendant, in selling a cannon to the plaintiff, concealed some defects in the gun so that they could not be discovered by inspection, but the plaintiff accepted the gun without inspecting at all; since the defendant's deceit went for naught, he was held not liable:

Horsfall vs. Thomas, 1 H. & C. 90 [1862].

Chandelor vs. Lopus, Croke's Jacobus, 2. King's Bench (1603).

The defendant, who was a jeweller, sold to the plaintiff a stone which he represented to be a bezoar stone. The article was not a bezoar stone, and the plaintiff sued as for a tort in selling it as such. Whether or not the vendor knew that the article was not a bezoar stone was not stated in the pleadings and did not otherwise appear in the case. It was held that the defendant was not liable, there having been no warranty that his representation was true. The language imputed to the court imports that every dealer has a right to tell lies for the sake of making sales.

"For the bare affirmation that it was a Bezoar stone, without warranting it to be so, is no cause of action. And, although he knew it to be no Bezoar stone, it is not material. For every one, in selling of his wares, will affirm that his wares are good, or the horse that he sells is sound; yet if he warrants them not to be so, it is no cause of action. And the warranty ought to be made at the same time as the sale. Wherefore, forasmuch as no warranty is alleged, they held the declaration to be ill. But Anderson to the contrary; for the deceit in selling it for a Bezoar, whereas it is not so, is a cause of action. But notwithstanding it was adjudged to be no cause, and judgment was reversed."*

Pasley vs. Freeman, 3 Term Reports. King's Bench (1789).

Pasley and his partner, having been requested by one Falch to sell him a large quantity of cochineal on credit, applied to Freeman for information as to Falch's responsibility. Falch was in fact, as the declaration alleged, "not then and there a person safely to be trusted and given credit in that respect; and the said Joseph [Freeman] well knew the same." Freeman, however, "intending to deceive and defraud" the plaintiffs, "and deceitfully encourage and persuade" them to sell the goods to Falch, "did for that purpose then and there falsely, deceit-

*"If the plaintiff in this case," says Mr. Smith, "were to claim upon a warranty of the stone, he would at the present day perhaps succeed, the rule of law being that every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended": 1 Smith's Leading Cases (8th ed.), 295; citing numerous authorities.

fully and fraudulently assert and affirm" to the plaintiffs that Falch "was a person safely to be trusted and given credit in that respect." The plaintiffs, confiding in what Freeman said, sold the goods to Falch, to the value of more than £2600, of which he never paid any part. *Held,* that the plaintiffs were entitled to recover damages against Freeman for the deceit practised by him. GROSE, J., dissented.

BULLER, J.: The foundation of this action is fraudulent deceit in the defendant and damage to the plaintiffs. And the question is, whether an action thus founded can be sustained in a court of law. Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. But it is contended that this was a bare naked lie; that, as no collusion with Falch is charged, it does not amount to a fraud; and, if there were any fraud, the nature of it is not stated. * * * I agree that an action cannot be supported for telling a bare naked lie; but that I define to be, saying a thing which is false, knowing or not knowing it to be so, and without any design to injure, cheat or deceive another person. Every deceit comprehends a lie; but a deceit is more than a lie, on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion to another person.

LORD KENYON, C. J.: All laws stand on the best and broadest basis which go to enforce moral and social duties, though indeed it is not every moral and social duty the neglect of which is the ground of an action. For there are some which are called in the civil law duties of imperfect obligation, for the enforcing of which no action lies. There are many cases where the pure effusion of a good mind may induce the performance of particular duties, which yet cannot be enforced by municipal laws. But there are certain duties, the nonperformance of which the jurisprudence of this country has made the subject of a civil action. And I find it laid down by LORD C. B. COMYNS that "an action upon the case for a deceit lies when a man does any deceit to the damage of another" [Com. Dig. Action upon the case for deceit; A. 1]. He has not indeed cited any authority for this opinion; but his opinion alone is of great authority; since he was considered by his contemporaries as the most able lawyer in Westminster Hall [*circa* 1740]. * * *

The plaintiffs applied to the defendant, telling him they were going to deal with Falch, and desired to be informed of his credit, when the defendant fraudulently, and knowing it to be otherwise, and with a design to deceive the plaintiffs, made the false affirmation which is stated on the record, by which they sustained a considerable damage. Then can a doubt be entertained for a moment but that this is injurious to the plaintiffs? If this be not an injury, I know not how to define the word.

Pilmore vs. Hood, 5 Bing. N. C. 97. Common Pleas (1838).

The defendant, being the lessee of a public house, endeavored to sell his lease to one Bowmer, and to that end falsely represented to Bowmer that the trade amounted to £180 per month, "all retail over the counter." Bowmer was unable to make the purchase, but recommended the place to Pilmore, stating to Pilmore what Hood had said concerning the value of the trade. Pilmore accordingly entered into negotiations with Hood for the purchase, Hood knowing that his representation as to the volume of the business had been repeated by Bowmer to Pilmore. Hood made no statement on that point to Pilmore, nor did he correct the latter's belief derived from Bowmer. Pilmore bought the lease at a price proportioned to the alleged volume of the trade, and sustained great loss from being obliged to carry on an unprofitable establishment. *Held*, that Pilmore was entitled to recover damages against Hood.

Cornfoot vs. Fowke, 6 M. & W. 358. Exchequer (1840).

Cornfoot owned a house in London, which he desired to lease, and for that purpose he employed one Clarke as his agent. Next door to the house was a house of ill-fame, which was so offensive in character that persons resident in the neighborhood had been unable to retain lodgers, and some of them had been obliged to give up their houses. This fact was known to Cornfoot, but Clarke did not know of it or of any other objection to the Cornfoot house. Sir F. G. Fowke, Bart., being desirous to rent a house in town for the purpose of educating his children, visited the house of Cornfoot and found that it suited his needs. He inquired of Clarke, "Is there anything objectionable about the house?" To which Clarke, innocently and in good faith, answered, "Nothing whatever"; whereupon Fowke agreed to take the house for two years at £375 *per annum*, and executed a lease of that effect. On the next day he discovered the character of the house next door; and, as he had four children, of whom the eldest was a daughter sixteen years of age, this discovery impressed him as a rather solid objection to the house that he had taken. Accordingly, he declined to occupy the Cornfoot property, or to pay for it. Cornfoot thereupon brought suit for the rent agreed upon. The defendant pleaded that he had been induced to enter into the agreement by means of the fraud, covin and misrepresentation of the plaintiff and of others in collusion with him. At the trial, the facts above stated appearing, the judge, CHIEF BARON ABINGER, left it to the jury whether the character of the adjoining house constituted a substantial objection to the Cornfoot house, and told them that, if they thought so and found that Fowke had been deceived, their verdict should be in his favor. The verdict was for the defendant. On motion of the plaintiff this verdict was set aside and a new trial ordered, on the ground of misdirection; LORD ABINGER dissenting, but

the other three judges holding that the landlord could not be guilty of deceit because he had made no misrepresentation, and that there was no deceit on the part of the agent because he had told no intentional falsehood.

ALDERSON, B.: I think it impossible to sustain a charge of fraud, when neither principal nor agent has committed any—the principal, because, though he knew the fact, he was not cognisant of the misrepresentation being made, nor ever directed the agent to make it; and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bona fide*.

Haycraft vs. Creasy, 2 East. 92. King's Bench (1801).

A Miss Robertson, having all her life been a governess or a teacher in boarding-schools, became tired of being poor and resolved to be rich. Accordingly, and quite on a sudden, she gave herself out as a person of great wealth, stating that she had succeeded, upon the recent death of her mother, to a considerable fortune, and representing that she had great expectations from other relatives who were going to die without unreasonable delay. She went to Blackheath, where she took a large house, which she fitted up in a very expensive manner, and exhibited a quite imposing display of plate and other insignia of great affluence, including the keeping of a carriage. Among other things, she pretended to own a large estate in Scotland, of which she produced plats, with estimates concerning the extent and value of the timber; and as steward for this estate she engaged a very respectable man of business, from whom she took a bond to a large amount to insure his accounting for the rents and his fidelity in other respects. By such means the lady obtained credit to considerable amounts from many persons, as for example, from Mr. Creasy, who lent her £2000 without taking any security therefor.

In the course of her brilliant career Miss Robertson applied to Haycraft, an ironmonger, to sell her a large quantity of hardware on credit. Haycraft's son, who conducted his father's business, inquired as to her responsibility of Creasy, who said: "Your father may credit her with perfect safety; for I know of my own knowledge that she has been left a considerable fortune by her mother, and that she is in daily expectation of a much greater at the death of her grandfather, who has been

bedridden a considerable time." Upon the strength of this and other like assurances afforded by Creasy, the plaintiff supplied Miss Robertson with merchandise to the value of £485, for which she did not pay, and for which, as it soon developed, she had never been able to pay.

Haycraft sued Creasy as for deceit in falsely representing the woman to be of good credit. LORD KENYON, who tried the case at *nisi prius* and allowed the plaintiff to take a verdict, was of opinion that Creasy was liable, and so expressed himself with some touch of acrimony. But the three other judges who sat with him on a motion for new trial held that the defendant had not been guilty of any actionable deceit, and the verdict was set aside upon grounds which made it useless to go to a second trial.*

GROSE, J.: Now I know not where to find any fraud in the transaction between these parties. I consider what was said by the defendant upon the several occasions as no more than asserting his opinion of the credit of Miss Robertson, an opinion which he seems fairly to have entertained. It is true that he asserted his own knowledge upon the subject; but consider what the subject-matter was of which that knowledge was predicated; it was concerning the credit of another, which is a matter of opinion. When he used those words, therefore, it is plain that he only meant to convey his strong belief in her credit, founded upon the means he had of forming such opinion and belief. There is no reason for us to suppose that, at the time of making those declarations, he meant to tell a lie and mislead the plaintiff. * * * And, taking the whole together, I think the evidence goes no further than his asserting that, to his firm belief and conviction, she was deserving of credit; and that the defendant himself was the dupe to appearances. But, until some case shall be decided which goes further than that of Pasley vs. Freeman, there must be evidence of fraud to support such an action; and evidence of being a dupe is not sufficient.

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*It was supposed at the bar that LORD KENYON'S death, which occurred not long after, was occasioned by the overruling of his opinion in this case He is reported to have said:

"If the present action cannot be supported, I have now for twelve years [*i. e.*, since Pasley vs. Freeman] been deceiving the people of this country. Am I now, when perhaps from years the progress of my intellect may be to retrograde, to unsay what I have said so often? Where can I go to hide my head? The ground I go upon is this: Did the defendant assert to be true that which he did not know to be true? This I consider sufficient evidence to support the charge of fraud. It may not amount to moral turpitude, but it is, in my opinion, sufficient to constitute legal fraud, and legal fraud is, in my opinion, enough to support an action of deceit." As the other judges delivered their opinion to the contrary, the face of the CHIEF JUSTICE showed the most terrible contortions; and when they had finished, he exclaimed: "Good God! what injustice have I hitherto been doing. What injustice I have been doing." Campbell, Lives of the Chief Justices, v. 4, p. 88.

Browning vs. Bank, 13 App. D. C. 1 (1898).

One Scott, desiring to borrow money, procured Browning to write a letter to the president of the National Capital Bank, in which letter Browning said: "Mr. Scott is worth to my personal knowledge seventy-five thousand dollars, over sixty thousand dollars in real estate." On the faith of this letter and of some other like representations, the bank lent Scott $2500. Scott did not own nearly so much property as was stated, but was at the time seriously embarrassed and in debt to Browning. Shortly afterwards he made an assignment for the benefit of creditors, and the bank lost almost all of the loan made to him. It did not, however, appear that Browning had been guilty of willful misstatement or actuated by any fraudulent motive, but he seems to have mistaken in his conception of Scott's standing and the extent of his property. The bank brought this action against Browning for deceit in his representation of Scott's solvency, and obtained a judgment for the amount lost on the loan. This judgment was affirmed on appeal.

ALVEY, C. J.: But the defendant, on the other hand, contends that although the representations made were in fact untrue, and therefore calculated to deceive, yet if made in good faith and in the honest belief that they were substantially true; or if made without a fraudulent purpose to deceive the plaintiff; or if the defendant was mistaken as to the truth of the representations made, but made them in good faith, believing them to be substantially true, and without a fraudulent intent to deceive the plaintiff, then, on either of these propositions of fact being found, the plaintiff would not be entitled to recover.

The defendant, in support of his contention, relies principally upon the well-known English case of Haycraft vs. Creasy, 2 East, 92, and the cases of Russell vs. Clark, 7 Cranch, 93, and Lord vs. Goddard, 13 How. 198.

In the first of these cases, that of Haycraft vs. Creasy, it was held, upon the facts there in proof, that the action was not maintainable; though the language of the representation was, no doubt, very strong, and professed to be made of personal knowledge. But the representation was not made of any particular amount of wealth possessed by the party recommended, nor for any particular amount of credit to be extended. The representation was regarded by the court as rather matter of opinion on the part of the defendant, as to the credit that might be safely extended to the party in whose behalf the representation was made, than the affirmation of an existing fact within the knowledge of the defendant. The case was decided against a strong dissenting opinion by LORD KENYON, Chief Justice, and whose opinion has not been without influence

in subsequent cases. There is much in that opinion that must commend itself to every one seeking to place the rule of responsibility upon the solid grounds of reason and justice. The rule, however, as laid down by a majority of the court in that case, is, that if it appear that the representation was made by the defendant *bona fide*, and with a belief of the truth of it, no action can be maintained; as the foundation of the action is fraud and deceit of the defendant and damage to the plaintiff, by means thereof. And with respect to the terms of the representation used in that case, taking the assertion of personal knowledge *secundum subjectam materiam*, viz., the credit of another, it was held to have no other meaning than a strong belief founded on what appeared to the defendant to be reasonable and certain grounds for an opinion. LORD KENYON did not so construe the representation, and hence he was for holding the defendant liable.

The case of Russell vs. Clark presents some peculiar features that distinguish it from the present case. It was a case in equity, and the letters there used as the foundation of the claim set up by the plaintiff were ordinary letters of recommendation, and it was held that a misrepresentation of the solidity of a mercantile house made under a mistake of the fact, without any interest or fraudulent intention, will not sustain an action, although the plaintiff may have suffered damage by reason of such misrepresentation. And after stating the circumstances that would give a right of action for fraud and deceit, the court proceeds to say: "But this does not appear to the court to be the case described. It is proved incontestably, that when the letters on which this suit depends were written, Robert Murray & Co. were in high credit, and were carrying on business to a great extent, which was generally deemed profitable. The bill charges particular knowledge in Clark and Nightingale, that this apparent prosperity was not real. But this, as well as every other allegation of fraud, is explicitly denied by the answer; and the answer, being responsive to the bill, is evidence. Had the plaintiff been able to exhibit proofs which would have rendered this fact doubtful, it might have been proper to have directed an issue for the purpose of trying it; but he has exhibited no such proofs. In writing the letters, then, recited in the bill, Clark and Nightingale stand acquitted of the imputation of fraud." After referring to the circumstances under which the letters were written, the court proceeds to say: "Merchants know the circumstances under which recommendations of this description must be given. They know that when one commercial man speaks of another in extensive business, he must be presumed to speak from that knowledge only which is given by reputation. He is not supposed to have inspected all the books and transactions of his friend, with the critical eye which is employed in a case of bankruptcy. He must, therefore, be supposed to speak of the credit, not of the actual known funds of the person he recommends; of his apparent, not of his real solidity. In such a case it is certainly incautious and indiscreet to use terms which imply absolute and positive knowledge. It may, perhaps, be admitted that, in such a case, fraud may be presumed on slighter evidence than would be required in a case where a letter was written with more circumspection.

Yet, even in such a case, where the communication is honestly made, and the party making it has no interest in the transaction, he has never been declared to be responsible for its actual verity. The reason of the rule is, that merchants generally possess, and are therefore presumed, in their correspondence, to speak from that knowledge only of the circumstances of other merchants, which may be acquired by observing their course of business, their punctuality, and their general credit."

The letters in that case contained no such representation of personal knowledge as is contained in the letter in this case, and it is manifest, from the whole tenor of the opinion, that the court was contemplating and treating of a very different class of letters from the one under consideration here. In the letter before us its author does not simply speak of the commercial credit of his friend, Mr. Scott, but of the actual known funds owned by him; of the specific amount of property, real and personal, owned to the personal knowledge of the defendant.

In the case of Lord & Jenness vs. Goddard, the letter of recommendation simply represented that the parties, West and Duby, in whose favor the letter was written, "were men well worthy of credit, and good for what they wished to purchase;" and it was held that if there was no intention to defraud and deceive, in giving the letter, but the writers of it honestly stated their own opinion, believing at the time that they stated the truth, they were not liable, although the representation turned out to be entirely untrue. The letter in that case was very different in character from the one here presented.

It is certainly true that fraud and deceit are essential elements to the maintenance of actions of this character; but what constitutes fraud in such cases is a question about which there has been a great deal of discussion, and no little diversity of opinion. It has often been asserted and held by courts of high authority, that where the defendant affirms that to be true within his own knowledge which he does not know to be true, to induce another to act upon it, and it is acted upon, such affirmation is equally fraudulent and deceptive, as where he asserts that to be true which he knows to be false. There is deception in both cases; and, if wrong and injury results, the remedy ought to be the same. And so where a representation of a fact, susceptible of actual knowledge, is recklessly made, the party making it being indifferent how the truth of the matter really stands, and damage results, the party should be held liable. * * *

And the principle thus stated appears to be strictly in accordance with the rulings of the English courts upon this subject. According to the decisions of those courts, made in many cases, if a party undertakes positively to assert that to be true which he does not know to be true, and which he has no sufficient or reasonable grounds for believing to be true, in order to induce another to act upon the faith of the representation, and the representation is acted upon and it turns out to be false, and the person who has acted upon the representation has been deceived to his damage, he is entitled to maintain an action for the deception. For whoever pretends to have positive knowledge of the existence of a particular fact, or state of things, when in truth he knows nothing

about it, does in reality make a wilful representation which he knows to be false; and if such representation is made in order that another may rely upon it, and act upon it, and it is acted upon, and damage results therefrom, the person making the representation is in principle guilty of wilful deception and fraud. Pawson vs. Watson, Cowp. 788; Jenkins vs. Hutchinson, 13 Q. B. 748; Evans vs. Edmonds, 13 C. B. 786; Peek vs. Derry, 59 L. T. (N. S.), 78; S. C. 14 App. Cas. 337. Many other cases could be cited in support of this well-founded principle, but it is unnecessary to cite more than those to which we have referred.

And though fraud and deceit are essential elements to be shown to exist, in order to maintain the action, yet it is not necessary to prove that the false representation was made from a corrupt motive of gain to the defendant, or wicked and corrupt motive of injury to the plaintiff. It is enough if the representation that is made was known to the person making it to be untrue, or that he did not know it to be true, and had no sufficient reason to believe it to be true, and which was intended or calculated to induce another to act on the faith of such representation, in a way to produce injury, and damage actually results. Such a wilful, false representation is, in a legal sense, a fraud. Polhill vs. Walter, 3 B. & Ad. 123; Milne vs. Marwood, 15 C. B. 778. For, whatever may be the motive, if a man states what is false within his knowledge, or what he has no reasonable ground for believing to be true, and makes the representation with a view to induce another to act upon it, who does so act upon it to his injury, the law imputes to the party making the representation a fraudulent intent, although he may not have been in fact actuated by a morally bad motive. Foster vs. Charles, 7 Bing. 107; Kerr on Fraud and Mistake, pp. 55, 56. Hence it has been decided in many cases, and is laid down as text law, that where a party makes a representation without knowing whether it be true or false, he is, both in morals and legal contemplation, as blamable as if he made the representation knowing it to be false. And, therefore, if a party states a material fact as true to his own personal knowledge to induce another to act upon such representation, and that fact is susceptible of knowledge, but proves to be false, he is guilty of a fraud which renders him liable to the person who relies upon and acts upon the representation as true, to his injury; and it is no defense for the defendant that he believed the representation to be true. Bigelow on Frauds, 513, 514; Cabot vs. Christie, 42 Vt. 121; Busterud vs. Farrington, 36 Minn. 320; Bullitt vs. Farrar, 42 Minn. 8; Munroe vs. Pritchett, 16 Ala. 785; Mayer vs. Salazar, 84 Cal. 646; Litchfield vs. Hutchinson, 117 Mass. 195; Fisher vs. Mellen, 103 Mass. 503; Chatham Furnace Co. vs. Moffatt, 147 Mass. 403, and the cases there cited; and Lynch vs. Trust Co., 18 Fed. Rep. 486.

Cooper vs. Schlesinger, 111 U. S. 148. Supreme Court of the United States (1884).

This was an action for goods sold and delivered. The defence was, in part, that the sale had been procured by fraudu-

lent representations. On this point the trial court gave the instruction which is set out below, and exceptions were taken to those sentences which are enclosed in brackets. The charge was approved by the Supreme Court, by which court it was observed: "Taking the two sentences excepted to in connection with the rest of the charge, the jury were properly instructed that a statement recklessly made, without knowledge of its truth, was a false statement knowingly made, within the settled rule. In the charge on this branch of the case we see no error."

It is not necessary, to constitute a fraud, that a man who makes a false statement should know precisely that it is false. It is enough if it be false, and if it be made recklessly, and without an honest belief in its truth, or without reasonable ground for believing it to be true, and be made deliberately and in such a way as to give the person to whom it is made reasonable ground for supposing that it was meant to be acted upon, and has been acted upon by him accordingly. It is important that this party knew, or had reason to know, that the representations he was making at the time were false, so as to make an element constituting a fraud that would entitle a party like the defendants to maintain a suit upon it. * * * A false representation does not amount to a fraud in law unless it be made with a fraudulent intent. There is, however, a fraudulent intent if a man, either with a view of benefitting himself, or of misleading another into a cause of action, makes a representation which he knows to be false or does not believe to be true. * * * It is not every misrepresentation in the making of a contract that constitutes a fraud upon which a party may rely to set aside the binding obligation of a contract. The misrepresentation must be in relation to a fact or a state of facts which is material to the transaction, and the determining ground of the transaction. There must be the assertion of a fact upon which the person entering into the transaction relied, and in the absence of which it is reasonable to infer that he would not have entered into it, or at least not upon the same terms. Both facts must concur. There must be a false and material representation, and the party seeking relief should have acted upon the faith and credit of such representation. [A representation, to be material, should be in respect of an existing and ascertainable fact, as distinguished from a mere matter of opinion or advice]. In many of these trading transactions there is a system of misrepresentation in regard to the value of property, and several other things that sometimes enter into a contract, that does not constitute representations of existing facts, but simply the opinion or advice of the party who makes the representations; and that class of representations does not constitute and lay a foundation for the maintenance of an action of fraud. [It must be a representation of existing facts that turn out to be false, and that the party at the time knew to be false.] These are general principles that you are to look into, in order to ascertain, in the light of the evidence, whether the

defendants in this action have been able to substantiate, by a fair preponderance of proof on their side, taking all the evidence together, that these representations were of this character—that they were false, that the party knew them to be false, and that they were made for the purpose and with the intent of defrauding this party at the time they were made, these all constituting elements necessary to be made in order to maintain this sort of action.

Van Epps vs. Harrison, 5 Hill. 63. New York (1843).

In 1835 or 1836, Van Epps purchased forty-three acres of farm land near Albany, New York, paying for the tract $16,000. He then offered to sell an interest in the property to Harrison; and, to induce the latter to buy, Van Epps represented that he had paid $32,000 for the land, and that it was a smooth and level tract, naturally suited for the site of a town, and for that purpose requiring no grading. The tract was in fact rough and hilly, and could not be made available for urban uses except by expensive grading. Harrison, who lived at the distance of ten hours' travel from Albany, (apparently in New York), did not go to examine the land, but, confiding in the representations made by Van Epps, agreed to buy a one-tenth interest in the property for $3,200, of which sum he paid a part, and for the balance of which he gave a bond. Afterwards he discovered that he had been deceived, and refused to pay the balance agreed. Van Epps brought this action upon the bond. At the trial, the defendant offered to prove that the plaintiff had misrepresented the price paid for the land and also the character and condition thereof. The trial judge refused to receive this proof, being of opinion that deceit on such points would not entitle the defendant to repudiate his contract. On motion for a new trial, the Supreme Court overruled this holding, and declared that the defendant should prevail if he could establish that he had been deceived by the false representations alleged.

BRONSON, C. J.: According to the third and fourth offers of evidence, the land was purchased for the purpose of being laid out and sold for building lots, and the plaintiff knew it. He also knew, and the defendant did not know, the condition and situation of the land; and the plaintiff falsely represented that the land was even and level, well situated for building lots, and required no grading; all of which was false.

It will seem marvelous, if not wholly incredible, to those who did not live in the years eighteen hundred thirty-five and six, that men should purchase lands lying within ten hours' ride of their residence, and agree to pay $32,000, without even having taken the trouble to look at the property, either in person or by agent. But farms lying in the vicinity of cities and villages were then so much in demand for the building of new towns that many persons thought it best not to hazard the loss of a bargain by stopping to look or inquire, when they could purchase at a thousand dollars an acre. They might better lose the little sum of $32,000 than be absent one whole day from Wall street, and thus miss the possible chance of purchasing the site of some other prospective city of much greater magnitude. Wonderful as it may seem to the next generation, such things did happen; and in this case the defendant offered to prove that he knew nothing about the land except that it lay on the opposite side of the river from the city of Albany. He trusted to the representations of the plaintiff in relation to the condition of the property; and the only question is, whether the defendant must charge the loss upon his own folly and the madness of the times, or whether the plaintiff has done such a wrong as may be redressed by an action. The credulity of the defendant furnishes but a poor excuse for the falsehood and fraud of the plaintiff, and the latter will have no just ground for complaint if he is held responsible for his misconduct. I am not entirely without apprehension that some bad consequences may result from giving an action against the vendor for misrepresentations concerning the quality or condition of the land he sells. Common prudence requires that the vendee should ascertain the truth of such assertions before he acts. But I am unable to distinguish this case from Sanford vs. Handy, 23 Wend. 260. There the alleged misrepresentation related to the location of the land. Here the false representation related to the condition of the property or the practicability of using it for building purposes with little or no expense. We think the evidence should have been received.

* * *

There was a further offer to show that the plaintiff represented that he had just paid $32,000 for the land, when in truth he had paid only half that sum. An intimation was thrown out by the chief justice in Sanford vs. Handy, 23 Wend. 260, that a misrepresentation as to the actual cost of property might be a material fact; but the point was not decided. It is not every false affirmation of the vendor which will give the vendee an action, although he may be deceived by it. It often happens in the making of bargains that many things are said which neither party regards as of much consequence; and if the buyer trusts to representations which are not calculated to impose upon a man of ordinary prudence, or if he neglects the means of information easily within his reach, it is better that he should suffer the consequences of his own folly than to give him an action against the seller. See 2 Starkie Evidence, 471, Ed. of 1826; Bowring vs. Stevens, 2 C. & P. 337; Sugden on Vendors, 2, 3. No action will lie for a false representation concerning the value of the thing sold, it being deemed the folly of the purchaser to credit the assertion. And, besides, value is a matter of judgment and estimation, about which men may differ. Nor will an action lie for a

false affirmation that a person bid a particular sum for the estate, although the vendee was thereby induced to purchase, and was deceived as to the value. And so of other cases where the purchaser might, by the exercise of common prudence, have ascertained the truth and saved himself from injury; Harvey vs. Young, Yelverton, 21; Davis vs. Meeker, 5 Johns, 354; Bayly vs. Merrill, Cro. Jac. 386; Fenton vs. Browne, 14 Vesey, 145; Sugden on Vendors, 2, 3. In such cases the false affirmation is not enough. The vendee must go further and show that some deceit was practised for the purpose of putting him off his guard; Dawes vs. King, 1 Starkie, 75. In Elkins vs. Tresham, 1 Lev. 102, it was held that an action would lie for falsely affirming that the property was let at £42 per annum, when the rent was less than that sum, by which the plaintiff was deceived and induced to pay a high price for the property. It was admitted, however, that no action would lie for a false affirmation concerning value; but a distinction was taken as to the rent; and the court said: "Perhaps the lease is by parol, or the tenant will not inform the purchaser what rent he gave." This decision was followed in Lysney vs. Selby, 2 Ld. Raymond, 1118; 1 Salkeld, 214 S. C., by the name of Risney vs. Selby. But LORD HOLT said of Elkins vs. Tresham, that "If it were not for that resolution, I should think it a hard action to maintain." * * *

If an affirmation concerning the cost of the property was of any consequence, I think the defendant should have taken the trouble to inquire and satisfy himself. But I cannot think it a matter of any legal importance. It was only another mode of asserting that the property was of the value of $32,000; and all the books agree that no action will lie if such an affirmation prove false. It is the folly of the purchaser to trust to it. Indeed, the representation here amounts to less than a direct affirmation of value, for it only asserts that the plaintiff and another man agreed that such was the value. It would lead to great mischief to allow men to annul contracts upon such a ground. * * *

Such are my views upon this branch of the case. But my brethren are of opinion that the false affirmation concerning the price paid for the land furnishes a good ground of action. There must, therefore, be a new trial upon this point, as well as on the one relating to the condition of the land.

Stewart vs. Wyoming Cattle Ranch Company, 128 U. S. 383. Supreme Court of the United States (1888).

The Wyoming Cattle Ranche Company, a corporation composed chiefly of British citizens, desired to purchase land in Wyoming for the purpose of raising cattle. Stewart owned a large tract in Wyoming, on which he was raising a great number of cattle. This property, as a whole, he offered to sell to the company for $400,000; and he represented that the herd amounted to 15000 head of cattle. The company sent an agent

to verify Stewart's statements. Stewart entertained the agent for several days, repeated to him the representations made to the company, took him over the ranche and showed him much of the property. Stewart, however, did not allow the agent to see anything which would be inconsistent with the statements made to the company; and, when the agent proposed to consult the foreman and other employees concerning the number of calves branded and other matters indicating the size of the herd, Stewart requested him not to do so, and thus prevented the making of inquiries which would have shown that Stewart's representations were false. The agent made a favorable report and the company bought the ranch for $400,000. It was afterwards discovered that the number of the cattle had been greatly exaggerated, and the company brought this action to recover damages on the ground that Stewart had been guilty of deceit, which action resulted in a verdict and judgment for the plaintiff.

Among the instructions given at the trial to the jury was this:

"If the jury find from the evidence that Stewart purposely kept silent when he ought to have spoken and informed Clay [the agent] of material facts, or find that by any language or acts he intentionally misled Clay about the number of cattle in the herd, or the number of calves branded in the spring of 1882, or by any acts of expression or by silence consciously misled or deceived Clay, or permitted him to be misled or deceived, then the jury will be justified in finding that Stewart made material misrepresentations; and must find for the plaintiff if the plaintiff believed and relied upon the representations made by the defendant."

This, and the other instructions given, were approved, and the judgment was affirmed.

GRAY, J.: Taking all the instructions together, we are of opinion that they conform to the well-settled law, and that there is no ground for supposing that the jury can have been misled by any of the instructions excepted to.

In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare;* a suppression of the truth may amount to a suggestion of false-

hood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff. * * *

The words and conduct relied on as amounting to false representations were those of the seller of a large herd of cattle ranging over an extensive territory, and related to the number of the herd itself, of which he had full knowledge, or means of information, not readily accessible to a purchaser coming from abroad; and the plaintiff introduced evidence tending to show that the defendant, while going over the ranche with the plaintiff's agent, made positive false representations as to the number of calves branded during the year, and also fraudulently prevented him from procuring other information as to the number of calves and consequently as to the number of cattle on the ranche.

In giving the fourteenth instruction, the judge expressly declined to say that, if the defendant prevented the plaintiff's agent from prosecuting inquiries which might have led to information that less than 2,000 calves had been branded, such acts of the defendant would amount in law to misrepresentations; but on the contrary submitted to the jury the question whether the defendant fraudulently and improperly prevented the plaintiff's agent from procuring the information demanded; and only instructed them that if he did, that was making, or equal to making, false and fraudulent representations for the purpose in question.

So the clear meaning of the sixteenth instruction is, that the jury were not authorized to find material misrepresentations by the defendant, unless he purposely kept silent as to material facts which it was his duty to disclose, or by language or acts purposely misled the plaintiff's agent about the number of cattle in the herd or the number of calves branded, or, by words or silence, knowingly misled or deceived him, or knowingly permitted him to be misled or deceived, in regard to such material facts, and in one of these ways purposely produced a false impression upon his mind.

Tyssowski vs. The F. H. Smith Company, 35 App. D. C. 403 (1910).

The Tyssowski brothers owned the Home Life Building, which contained a large number of rooms let as offices. The ground floor of this building was occupied by the Pennsylvania Railroad Company under a lease which in 1906 extended some years into the future. The Smith Company was engaged in the brokerage of real estate. On November 8, 1906, one Stilson Hutchins signed an agreement with the Smith Company, whereby he bound himself to pay $300,000 for the Home Life

Building if it could be bought free of leases. On November 26th, the company induced the Tyssowski brothers to sign an agreement to sell the building for $300,000, among the terms of which agreement were these: "Taxes, interest, rents and insurance to be adjusted to date of transfer. Purchaser to make full settlement in accordance with the terms of this sale within sixty days from this date, or deposit to be forfeited. . . . We will pay you a commission of $3,000." The sale was never effected, because Mr. Hutchins was unwilling to take the property subject to leases, and the Messrs. Tyssowsyl were unable to get rid of the Pennsylvania Company and some other tenants. The Tyssowskis sued the Smith Company for the deceit in leading them into the contract of sale, the theory being that the conduct of the company amounted to a representation that it had a client willing to take the property upon the terms embodied in the agreement of November 26th, that is to say, subject to the existing leases. *Held*, that the defendant company was liable for any damages sustained by the plaintiffs in consequence of that agreement, the defendant having suppressed the fact that Hutchins was not willing to take the property subject to the existing leases, which fact the company was bound to disclose.

Laidlaw vs. Organ, 2 Wheaton, 178. Supreme Court of the United States (1817).

In the early part of the year 1815, it was not generally known at New Orleans that peace between the United States and Great Britain had been concluded, but Organ had learned of the treaty somewhat in advance of his neighbors. This fact, so soon as it should become publicly known, would at once and greatly enhance the price of tobacco. Organ approached Laidlaw, who had not heard of the peace, with the proposal to buy a quantity of tobacco at the price then prevailing. Laidlaw asked whether there was any news. What answer was given by Organ did not distinctly appear, but it seemed to have been of an evasive character; and the proof on this point was so unsatisfactory that the case was remanded for a second trial in order to develop precisely what was said. At any rate, Laidlaw agreed to sell the tobacco at the price then current, which had not been affected by the peace. Afterwards Laidlaw refused to deliver the tobacco; and, when suit was brought against him on that account, he set up the defence that Organ's suppression of his knowledge concerning the peace amounted to deception. The trial court, without (as was held) sufficiently ascertaining what Organ had said, directed a verdict for the plaintiff. The

judgment was reversed on the possibility that some affirmative misrepresentation might have been made, which would have constituted fraud; but it was clearly stated that the mere silence of Organ as to a material fact within his knowledge was not fraud.*

MARSHALL, C. J.: The question in this case is whether the intelligence of extrinsic circumstances which influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor? The Court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties. But, at the same time, each party must take care not to say or do anything tending to impose upon the other.

The court thinks that the absolute instruction of the judge was erroneous, and that the question, whether any imposition was practiced by the vendee upon the vendor, ought to have been submitted to the jury. For these reasons the judgment must be reversed, and the cause remanded. . . .

Hill vs. Gray, 1 Starkie, 434. Nisi Prius (1816).

This was an action for the price of a painting sold to the defendant, who asserted fraud as ground for refusing to complete the purchase. The plaintiff had placed the picture for sale in the hands of one Butt, who at the time was selling a number of pictures for Sir Felix Agar. Butt was instructed not to tell whose property was the picture of the plaintiff, and

*"NOTA.—It was said that *Pasch.* 14 Eliz. Catlin, did cause a record of *Pasch.* 21 Hen. 7, to be read in the Queen's Bench, of a judgment given before FINEUX, C. J., and the case was, a woman in London had given to the plaintiff flattering words *aequipollentia* to a promise of marriage, and by that means he delivered to her money and other things, and she had caused the plaintiff to retain counsel, and to travel about her suits in chancery: and afterwards the woman refused to marry him and married another, in deceit and fraud of the plaintiff. The woman traversed all the matters alleged against her, and part was found for the plaintiff and part against him. And this one matter was found for him, that the woman had given unto him *blanda verba matrimonio aequipollentia;* and the plaintiff had judgment for those particulars that were found for him, and he was amerced for the other. And this was an action upon the case for the deceit in not marrying him, for he did not declare of any promise of marriage in fact. And Catlin said it was to be noted that the plaintiff had judgment, although but part found for him and part against him, which is contrary to that (as he said) that hath been ruled here twice or thrice, for That, if an assumpsit be brought upon several things, and part only is found for him, the plaintiff shall have no judgment for any part. But Southcote said that the record shewn was an action for divers deceits: which being traversed, and part found for the plaintiff, and part against him, yet judgment may be given for the plaintiff for the part, etc.; but of an entire promise it is otherwise, for there, failing in part, he fails in all"; King vs. Robinson, Coke Eliz. 79 [A. D. 1587].

the defendant conceived that it belonged to Sir Felix Agar, which erroneous belief, for some reason, made it in his opinion more desirable. Butt was aware that Gray was under this mistake and said nothing to correct his error, and Gray bought the painting, which was said to be by Claude Lorraine, at a price of £1000, which seems to have regarded as not excessive for such a work. Afterwards he refused to take and pay for the picture, alleging that it was not a genuine Claude. In an action for the price, the plaintiff was non-suited on the ground of deception as to the ownership.

LORD ELLENBOROUGH, C. J.: Although it was the finest picture that Claude ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and not to have let in a suspicion on the part of the purchaser, which enhanced the price. He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it. * * * This case has arrived at its termination, since it appears that the purchaser labored under a deception, in which the agent permitted him to remain, on a point which he thought material to influence his judgment. I am of opinion that the contract is void.

Peek vs. Derry, 14 Appeal Cases, 337. House of Lords (1889).

The Plymouth, Devonport and District Tramways Company was incorporated by an Act of Parliament which authorized the company to construct and operate a system of tramways in a certain district, subject to certain restrictions prescribed in the statute and by preexisting general legislation on the subject of such enterprises. The effect of the statutes was that the company was authorized to propel its cars only by animal power unless the use of steam or mechanical power should be authorized by the Board of Trade and consented to by the corporations of Plymouth and Devonport, and that the lines should not be opened for traffic without the consent of the municipalities named.

In a prospectus issued by the Tramways Company, for which Derry and the three other defendants were responsible as directors, it was stated positively that the company, "by the

special Act of Parliament obtained," had the right to use steam or mechanical motive power, whereby it was expected that the operation would be very economical as compared with the cost of operation by horses; and the prospectus bore the heading in conspicuous type, "Incorporated by special Act of Parliament authorizing the use of steam or mechanical motive power."

On the faith of this prospectus, Sir Henry William Peek bought and paid for a number of shares in the company. The tramways were constructed, but the Board of Trade refused to authorize the use of steam or mechanical power except on certain portions of the lines. The corporation of Devonport refused its consent to the opening of the completed portion of the system until the remainder was ready for use. In consequence of these facts, the project fell through and the company was wound up at great loss to the investors.

Peek brought this action against four directors who had been concerned in publishing the prospectus, the plaintiff maintaining that they had been guilty of deceit in stating that the company was authorized to use mechanical power when no such authority had in fact been given, and the right to use such power was contingent upon the approval of the Board of Trade and of the municipalities.

The defendants pleaded that the statements complained of were made by them in good faith and that they had reasonable grounds for believing such statements to be true. It appeared in evidence that, before the issue of the prospectus, the company had submitted its plans to the Board of Trade, the plans and an accompanying statement showing that it was intended to use mechanical power, and that no objection to the plans had been suggested by the Board. There was other testimony to the effect that the defendants understood, with more or less reason, that under the Act the consent of the Board was quite a matter of course and could not be refused, or that such consent had practically been given. It seemed quite clear that the defendants had all acted in good faith and actually believed that the right to use steam or mechanical power was fully assured.

The trial court, STIRLING, J., dismissed the action, holding on this evidence that the defendants believed that what they had said was true, that their belief was not unreasonable, and that their conduct was not so reckless or careless that they ought to be held liable in an action of deceit. On appeal to the Court of Appeals that court reversed the judgment of STIRLING, J. The defendants appealed to the House of Lords, which tribunal reversed the judgment of the Court of Appeals and held the defendants not liable. The opinion of LORD HERSCHELL, from which an extract is made below, was delivered in the House of Lords.

LORD HERSCHELL: Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in the truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley vs. Freeman, supra*, down to *Western Bank of Scotland vs. Addie, supra*, in 1867, when the first suggestion is to be found that belief, in the truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shown that this view was at once dissented from by LORD CRANWORTH, so that there was at the outset as much authority against it as for it. And I have met with no further assertion of LORD CHELMSFORD'S view until the case of *Weir vs. Bell*, 3 EX. D. 238, where it seems to be involved in LORD COTTON'S enunciation of the law of deceit. But no reason is there given in support of the view, it is treated as established law. The dictum of the late Master of Rolls, that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement was true, if there were no reason-

able grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion making a false statement through want of care falls far short of, and is a very different thing from fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. Indeed COTTON, L. J., himself indicated in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships, shews to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of *Taylor vs. Ashton*, 11 M. & W. 401, appears to be in direct conflict with the dictum of SIR GEORGE JESSEL, and inconsistent with the view taken by the learned judges in the Court below. I observe that SIR FREDERICK POLLOCK, in his able work on Torts (page 423, note), referring, I presume, to the dicta of COTTON, L. J., and, SIR GEORGE JESSEL, M. R., says that the actual decision in *Taylor vs. Ashton, supra*, is not consistent with the modern cases on the duty of directors of companies. I think he is right. But for the reasons I have given I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that, when a false statement has been made, the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by LORD BLACKBURN in *Brownlie vs. Campbell*, 5 App. Cas. at p. 592, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contains such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think, to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely to result from blurring the

distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

It now remains for me to apply what I believe to be the law to the facts of the present case:

What conclusions ought to be drawn from their evidence? I think they were mistaken in supposing that the consent of the Board of Trade would follow as a matter of course, because they had obtained their Act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus therefore was inaccurate. But this is not the question. If they believed that the consent of the Board of Trade was practically concluded by the passing of the Act, has the plaintiff made out, which it was for him to do, that they had been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established.

It is not unworthy of note that in his report to the Board of Trade, General Hutchinson, who was obviously aware of the provisions of the special Act, falls into the very same inaccuracy of language as is complained of in the defendants, for he says: "The Act of 1882 gives the company authority to use mechanical power over all their system."

I quite admit that the statements of witnesses as to their belief are by no means to be accepted blindfold. The probabilities must be considered. Whenever it is necessary to arrive at a conclusion as to the state of mind of another person, and to determine whether his belief under given circumstances was such as he alleges, we can only do so by applying the standard of conduct which our own experience of the ways of men has enabled us to form; by asking ourselves whether a reasonable man would be likely under the circumstances so to believe. I have applied this test, with the result that I have a strong conviction that a reasonable man situated as the defendants were, with their knowledge and means of knowledge, might well believe what they state they did believe, and consider that the representation made was substantially true.

Adopting the language of JESSEL, M. R., in *Smith vs. Chadwick*, 20 Ch. D. at p. 67, I conclude by saying that on the whole I have come to the conclusion that the statement, "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest and *bona fide* statement on the part of the defendants, and by no means exposes them to an action for deceit."

Atwood vs. Chapman, 68 Maine, 38 (1877).

DANFORTH, J.: This is an action to recover damages for an alleged deceit in relation to the title to certain lands conveyed by quitclaim deed from the defendant to the plaintiff. It is before us upon exceptions to the exclusion of certain testimony offered, and to the order of a nonsuit upon the testimony.

[After discussing the first count which alleged that the defendant had falsely stated that he had a good title.] The second count is more full, and though the cause of action may not be stated with entire accuracy, it is, perhaps, sufficiently so to enable us rightly to understand the "person and case" as presented by the testimony.

In this count the cause of complaint is that the defendant falsely stated his title to be good, and fraudulently concealed a material fact connected with it, which rendered it defeasible and subsequently defeated it, whereby the plaintiff took nothing by his deed. The direct representation of the title is the same as in the first count, and standing alone, the same suggestions will apply. But taken in connection with the alleged concealment, another and a very different question is presented. It may also be true that the concealment alleged by itself alone, might not be a cause of action. The rule of *caveat emptor* applies as well to real as to personal property. But this rule does not authorize deception in what is said or unsaid. If a person makes representations as to quality or title he is to speak the truth, or if he is placed or places himself in a position where his silence will convey a false impression, his suppression of the truth will be as much a fraud as a false statement. Hence, whether the withholding of a fact is fraudulent must depend upon the accompanying circumstances.

The testimony shows that the defendant's title to the land sold depended upon a judgment of this court, upon which an execution issued and was levied upon one parcel, while the other as an equity of redemption was sold on the same execution. Within a year from the recovery of the judgment a petition for a review of the action was commenced, and was pending in court at the time of the conveyance in question. Of this petition the defendant had knowledge, as he appeared as counsel for the respondent. The final result of this petition was the entire reversal of the judgment. To one parcel of land the defendant had a deed from the officer, to the other a deed from the judgment creditor. The fact concealed from the plaintiff was the pendency of this petition for review. Was it the duty

of the defendant to make it known? We think this question must be answered in the affirmative.

The testimony shows that the defendant had this knowledge while the plaintiff had not, and such was its nature and the profession of the two men, that it may with propriety be said to have been exclusively with the defendant; and, for the same reasons, as well as from other testimony, the jury would have been fully justified in the conclusion that the purchaser relied upon the seller to communicate all such facts.

But the testimony goes further than this. The defendant put himself in the position that by withholding the fact he must almost necessarily have conveyed a false impression. He not only stated that his title was good but he gave its origin and history, producing the papers to confirm it.

If he gives any fact he must give all the qualifications of that fact, otherwise he fails to give a true statement. When he says his title is good, and withholds an important fact which tends to impair it, he states more than the truth will authorize. When he produces a judgment from a court of competent jurisdiction with no apparent defect in it, as the foundation of his title, the plaintiff certainly had a right to understand him as asserting that, at least, so far as he knew, there was no infirmity connected with that judgment, no existing fact growing out of it, which might destroy it as a muniment of title.

Exceptions sustained.

Chatham Furnace Company vs. Moffatt, 147 Mass. 403 (1888).

C. ALLEN, J.: It is well settled in this Commonwealth that the charge of fraudulent intent, in an action for deceit, may be maintained by proof of a statement made as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate, or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make any further proof of an actual intent to deceive. The fraud consists in stating that the party knows the thing to exist, when he does not know it to exist, and if he does not know it to exist, he must ordinarily be deemed to know that he does not. Forgetfulness of its existence after a former knowledge, or a mere belief of its existence, will not warrant or excuse a statement of actual knowledge. This rule has been steadily adhered to in this Commonwealth, and rests alike

on sound policy and on sound legal principles. *Cole vs. Cassidy*, 138 Mass. 437; *Litchfield vs. Hutchinson*, 117 Mass. 195; *Milliken vs. Thorndike*, 103 Mass. 382; *Fisher vs. Mellen*, 103 Mass. 503; *Stone vs. Denny*, 4 Metc. 151; *Page vs. Bent*, 2 Metc. 371; *Hazard vs. Irwin*, 18 Pick. 95. And though this doctrine has not always been fully maintained elsewhere, it is supported by the following authorities, amongst others. *Cooper vs. Schlesinger*, 111 U. S. 148; *Bowes vs. Fenn*, 90 Penn. St. 359; *Brownlie vs. Campbell*, 5 App. Cas. 925, 953, by LORD BLACKBURN; *Reese River Mining Co. vs. Smith*, L. R. 4 H. L. 64, 79, 80, by LORD CAIRNS; *Slim vs. Croucher*, 1 DeG. F. & J. 518, by LORD CAMPBELL. See also *Peek vs. Derry*, 59 L. T. (N. S.), 78, which has been published since this decision was announced.

In the present case, the defendant held a lease of land, in which there was iron ore. The mine had formerly been worked, but operations had ceased, and the mine had become filled with water and debris. The defendant sought to sell this lease to the plaintiff, and represented to the plaintiff, as of his own knowledge, that there was a large quantity of iron ore, from 8,000 to 10,000 tons, in his ore bed, uncovered and ready to be taken out and visible when the bed was free from water and debris. The material point was, whether the mass of iron ore, which did in truth exist underground, was within the boundaries of the land included in the defendant's lease, and the material part of the defendant's statement was that this was in his ore bed; and the representations were not in fact true in this, that while in a mine connecting with the defendant's shaft there was ore sufficient in quantity and location relative to drifts to satisfy these representations, if it had been in the land covered by the defendant's lease, that ore was not in the defendant's mine, but was in the adjoining mine; and the defendant's mine was in fact worked out.

During the negotiations, the defendant exhibited to the plaintiff a plan of the survey of the mine, which had been made for him, and the plaintiff took a copy of it. In making this plan the surveyor, with the defendant's knowledge and assent, did not take the course of the first line leading from the shaft through which the mine was entered, but assumed it to be due north; and the defendant never took any means to verify the course of this line. In point of fact this line did not run due north, but ran to the west of north. If it had run due north, the survey, which was in other respects correct, would have correctly shown the mass of iron ore in question to have been within the boundaries of the land covered by the defendant's lease; but in consequence of this erroneous assumption the survey was misleading, the iron ore being in fact outside of those boundaries. It thus appears that the defendant knew that what purported to be a survey was not in all respects an actual survey, and that the line upon which all the others depended had not been verified, but was merely assumed; and this was not disclosed to the plaintiff. The defendant took it upon himself to assert, as of his own knowledge, that this large mass of ore was in his ore bed, that is, within his boundaries; and in support of this assertion he exhibited the plan of the survey, the first line of which had not been verified, and was erroneous. Now this statement was clearly of a thing which was susceptible of

knowledge. A real survey, all the lines of which had been properly verified, would have shown with accuracy where the ore was situated. It was within the defendant's knowledge that the first line of the plan had not been verified. If under such circumstances he chose to take it upon himself to say that he knew that the mass of ore which had been discovered was in his ore bed, in reliance upon a plan which he knew was not fully verified, it might properly be found that the charge of fraudulent misrepresentation was sustained, although he believed his statement to be true.

MASTER AND SERVANT.

A servant, in the technical sense of the term, is one who is employed to perform any work for another subject to the employer's direction and control in respect of the manner of the performance.

An independent contractor is one who undertakes to perform a specific work, not subjecting himself to the employer's direction and control in the performance, but contracting only for the result.

Usually an independent contractor is engaged in business on his own account, and a servant is usually employed upon business belonging to and managed by some one else. But an independent contractor may become, so far as liability for his acts is concerned, a servant by undertaking to act under the direction and control of his employer:

Railroad Co. vs. Hanning, *infra*, p. 406.

And any kind of service may be contracted to be done without direction and control, so that the person undertaking becomes an independent contractor.

I. *Master's Liability for Acts of Servant.*

The master, by the mere fact of employing a servant for certain purposes, assumes liability to third persons for any torts which the servant may commit while acting within the scope of his authority and in the course of his employment as servant to the master.

Scope of Authority, as the phrase is here used, includes not only such authority as is expressly committed by the master to the servant—as by command to do a specific act—but also such authority as is requisite and incidental to the performance of any service directed, and therefore implied by the direction to perform that service.

Thus, the servant may have the master's direct command to do a certain particular act; and if the act be unlawful or result injuriously to a third person, the master will be liable

just as if he, himself, had done the act. If, therefore, the act commanded by the master and done, according to his direction by the servant, amounts to a trespass, the master may be held responsible as for a trespass committed with his own hands:

Gregory vs. Piper, *infra,* p. 381.

So, if the master direct the servant to perform some service comprising a number of acts, which acts require or may require the exercise of discretion in respect of the manner or means of performing them, such general direction carries with it authority to act on behalf of the master to whatever extent is necessary to discharge the duty imposed upon the servant, and to exercise such discretion as is requisite to accomplish the result commanded. So far, therefore, as the servant acts in the performance of the service required, he acts within the scope of his authority, and the master is liable for any injury that the servant may do to others while thus acting. Accordingly, the master may be held responsible for the manner in which the servant chooses to discharge his duty, although such manner may be one of which the master would not approve, and even although the conduct of the servant may be in violation of express direction given by the master:

Limpus vs. Omnibus Co., *infra,* p. 382;
Seymour vs. Greenwood, *infra,* p. 383;
Axman vs. Gaslight Co., *infra,* p. 384.

The scope of the servant's authority is, however, limited to the conduct of his master's business and includes only such acts of the servant as are, or are intended by him to be, incident to the discharge of his duty to the master and in furtherance of the enterprise entrusted to the servant. For what the servant may do for his own purposes and from motives other than the desire to execute the commission given by the master, the latter is not responsible; and this is true even though the act may be done while the servant is engaged in the master's business and may be committed by means of the master's property placed in the servant's possession:

McManus vs. Crickett, *infra,* p. 387;
Croft vs. Alison, *infra,* p. 388.

The question is whether the act of the servant was done for the purpose of performing the service required of him by the master, or for the sake of effecting some purpose of the servant's:

Bergman vs. Hendrickson, *infra*, p. 383.

If, therefore, the act done be one which the master himself would have no authority to do, and he has not expressly directed the servant to do it, the general authority committed to the servant to perform a certain business does not imply an incidental direction to do such act which the master could not properly do; as where the management of an affair is entrusted to a servant, it is not usually implied that he is authorized by the master to arrest and prosecute other persons who are supposed to do wrong in connection with that affair:

Poulton vs. Railway Co., *infra*, p. 384;
Roche vs. Gaslight Co., *infra*, p. 385.

The limits of this principle in its application to the causing of arrests and prosecutions are uncertain and differently defined: thus it has been held that a salesman charged with the duty of selling his master's goods does not render the master liable for his act by causing the wrongful arrest of one suspected of shoplifting:

Mali vs. Lord, 39 N. Y. 381.

But in other jurisdictions the master is held liable in such a case:

Woodward vs. Ragland, 5 App. D. C. 220.

Course of Employment includes acts of the servant which, being within the scope of his authority, are done while he is engaged upon his master's business. It does not include an act of the servant which, although it is such as he is employed to do, is in the particular instance not done in the discharge of duty to his master but on the servant's own account and in the execution of some affair of his unconnected with the business of the master.

Thus, if the servant is employed to drive a cart, and, while driving it in the discharge of his duty to the master, he negligently runs down a third person, the injury is incidental to the master's business and the latter is liable. But if the servant takes the cart out of the hours of service and, while using it in some enterprise of his own, does an injury to some one else, for such mischief the master can not be held responsible:

Joel vs. Morrison, *infra*, p. 392.

If, however, the servant is in the discharge of a duty to the master, though he is performing the duty in a manner different from that prescribed, or improperly, or even contrary to directions, the master will be liable for the servant's delinquency; as where the servant, in driving a cart, deviates from the direct course required by the master's business for the sake of serving some purpose of his own:

Sleath vs. Wilson, *infra*, p. 393.

It is only where the enterprise upon which the servant is engaged is a total departure from the course of his master's business and distinctly an independent affair of the servant that the master is not liable:

Mitchell vs. Crassweller, *infra*, p. 393, and cases cited in note thereto.

A carpenter employed by the defendant was sent to work in a shed belonging to the plaintiff; while engaged in this work, the carpenter set fire to the shed by lighting his pipe with a shaving: it was held that the defendant was not liable for the damage so done to the shed: Williams vs. Jones, 3 H. & C. 256.

It is, of course, only the master who is responsible for the defaults of the servant; the fact that the servant may be, at the time of doing the mischief, rendering service to a third person by his master's direction does not render such third person liable:

Quarman vs. Burnett, *infra*, p. 388;
Laugher vs. Pointer, *infra*, p. 390.

II. *Liability for Acts of Independent Contractor.*

Work done by an independent contractor may cause actionable injury to other persons, either because of defects inherent in the work itself and directly resulting in damage, or because of negligence or other delinquency in the manner of doing the work. Thus, if the contractor undertakes to build a wall for his employer, and the wall, being built in conformity to the contract, is a nuisance or otherwise an injurious structure, the wrong done is one directly and necessarily involved in the work itself. If, however, the wall is not in itself injurious, but in building it the contractor is guilty of negligence, as by letting bricks fall upon persons passing by, the wrong here is only incidental and collateral to the work contracted for.

For injuries directly involved in, or necessarily resulting from, work done by an independent contractor, the contractor's employer is liable; but such employer is not liable for the contractor's delinquencies in the execution of the contract, which are merely collateral to the work itself:

Robbins vs. Chicago, *infra,* p. 409;
Hole vs. Railway Co., *infra,* p. 412;
Weilbacker vs. Putts Co., *infra,* p. 404.

Vice in the work signifies that condition which results either because the work itself is defective or otherwise intrinsically improper, or because the work, though in itself proper, is improperly done, in the sense of being a bad job: Bigelow on Torts, p. 143.

Negligence of the contractor or of his servants in the management of the construction is called collateral negligence. For vice in the work, though it is done by an independent contractor, the employer is responsible; but not for collateral negligence.

Cases wherein the employer is liable for injuries resulting from work done by an independent contractor may be thus classified:

1. Where the employer reserves to himself, or actually exercises, control over the execution of the work:

Burgess vs. Gray, *infra,* p. 405;
Railroad Co. vs. Hanning, *infra,* p. 406.

2. Where the work contracted for is itself a nuisance or otherwise unlawful:

Ellis vs. Sheffield Gas Co., *infra,* p. 408.

3. Where the employer is, himself, bound to produce a work of certain character, and the work done falls short of the requirement:

Hole vs. Railway Co., *infra,* p. 412.

So where the defendant, being licensed to open a highway for the purpose of constructing a drain, employed an independent contractor, who filled the excavation negligently, whereby the plaintiff was injured:

Gray vs. Pullen, 5 B. & S. 970.

So where the defendant, who maintained a lamp hanging over a sidewalk, employed an independent contractor to repair the lamp, which afterward, by reason of being insufficiently repaired, fell upon the plaintiff:

Tarry vs. Ashton, L. R. 1 Q. B. D. 314.

4. Where the work is in itself dangerous to other persons and likely to cause injury unless precautions are taken:

Chicago vs. Robbins, *infra,* p. 409;
D. C. vs. Blackman, *infra,* p. 410;
Railroad Co. vs. Karr, *infra,* p. 411;
Bower vs. Peate, L. R. 1 Q. B. D. 321.

So, where one was obliged to take down a high wall which had been damaged and made dangerous by fire, he was held liable for the delinquencies of an independent contractor:

Covington Bridge vs. Steinbrock, 61 Ohio St. 215.

The various principles which do and which do not operate to render an employer responsible for the delinquencies of an independent contractor are well illustrated in

Deford vs. State, *infra,* p. 401.

III. *Master's Liability to Servant.*

Assumption of Risk by a servant in undertaking an employment impliedly extends to all risks which are necessarily or ordinarily incident to the discharge of the duty undertaken, and which are apparent and intelligible to ordinary observation and understanding:

Butler vs. Frazee, *infra,* p. 416.

For injuries caused to the servant from such risks, the master is, in general, not liable:

Priestley vs. Fowler, *infra,* p. 414.

Other risks may, of course, be assumed by the servant, either by his express agreement to assume them, or by his undertaking to do work in the presence of dangers extrinsic to the work, but obviously present in the place or circumstances in which the work is to be done.

The Master's Duty toward the servant requires protection of the latter against risks not included in the assumption above defined; that is to say, the master is bound not to expose the servant to dangers which are not necessarily or ordinarily incident to the service, and therefore not impliedly risked by the servant's undertaking the service, or not otherwise assumed. Thus, a servant may agree to do dangerous work, and in so agreeing he assumes the hazards inherent in the work to be done; but he does not, necessarily at least, agree to assume the risk of injury which may result from some danger not incident to the work, such as the dangerous condition of the master's premises, the defective character of the tools supplied by the master, or the master's negligence in those matters of his business which are wholly collateral to the work undertaken by the servant.

The master is, therefore, under an obligation, if he provides a place for the servant to work, to see that the place is reasonably safe, that is, as safe as such a place can be made by exercising a reasonable degree of care and consistently with the character of the work to be done. So, if the master furnishes

the tools, machinery or appliances with which the work is to be done, he must use care to see that these things are reasonably sound and not likely to cause harm. In like manner, the master is bound to use reasonable diligence in the selection of competent and careful fellow-servants to work with the servant, to warn the servant of dangers in his work which are not obvious, and, generally, so to conduct the business that it shall not become unnecessarily dangerous to those employed therein:

Hough vs. Railway Co., *infra,* p. 423.

This duty of the master is, however, not an absolute one, but only one requiring reasonable diligence, and subject to qualifications due to the nature of the work done; as where the servant's place of work is necessarily, or necessarily becomes, unsafe by reason of the work itself:

Armour vs. Hahn, *infra,* p. 419.

And the degree of diligence demandable of the master depends upon a variety of considerations, some of which are differently regarded in different States:

Wonder vs. Railroad Co., *infra,* p. 421;
Enamelling Co. vs. Cornell, *infra,* p. 422.

IV. *Master's Liability for Torts of Fellow-servants.*

The risk of injury from the negligence or other wrongful conduct of other persons engaged in the same work is necessarily incident to the undertaking by one person to render service in which others are employed. The master, by employing a servant to work with other servants, does not assume liability to the servant for injuries caused to him by the tortious conduct of his fellow-servants.

Different Departments. In determining who are fellow-servants, regard must be had to the relations of service existing between the persons concerned. The fact that two persons have a common employer does not, of itself, make them fellow-servants; there must be such an association or correlation in their employment "that the safety of one servant must, in the ordi-

nary and natural course of things, depend on the care and skill of the other": Morgan vs. Rwy. Co., 5 B. & S. 736. Accordingly, a person employed in the legal or accounting department of a railway company is not a fellow-servant of the men operating the company's trains: Railroad Co. vs. Baugh, 149 U. S. 368.

In a few States (Illinois, Kentucky, Georgia), this principle has been applied to an extent beyond that allowed by the general body of authority; and in those States it has been held that persons are not fellow-servants unless either they are actually co-operating in the same line of employment, or their duties are "such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution." By this doctrine, the test of fellow-service seems to be actual association and mutual acquaintance; so that men employed upon trains are not fellow-servants with men employed upon tracks, nor are crews of different trains fellow-servants, although all are engaged in a common enterprise, the moving of trains.

In England, the Federal courts and most of the States, all persons are fellow-servants of a railway company whose duties bring them into contact with the company's traffic, so that they are exposed to danger from the operation of the trains: thus a carpenter engaged in repairing a turntable is a fellow-servant with those managing a locomotive by which he is injured: Morgan vs. Rwy. Co., 5 B. & S. 570; S. C., 5 B. & S. 736. A laborer employed in repairing the track is a fellow-servant with the engineer operating a train: Railroad Co. vs. Charless, 162 U. S. 359.

"This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow-service should not apply": Railway Co. vs. Dixon, 194 U. S. 338.

A Vice-Principal is a servant who is invested with such a degree of authority in the employment, direction and control of his fellow-servants that he may be deemed to stand, as to them, in the place of the master, and to be no longer, as to them, a fellow-servant. In some States (Ohio, Kentucky), it has been held that where a servant sustains injury from the negligence of another servant having superior rank and exercising the authority of the common master, the fellow-servant rule does not apply, but the delinquency of the vice-principal is a default for which the master is liable to the injured servant. This qualification of the general doctrine on the subject was approved by the Supreme Court of the United States in

Railway Co. vs. Ross, *infra,* p. 428.

In later cases, however, that court has receded from the position taken in the Ross case, and the doctrine of vice-principal was finally and distinctly disapproved in

Railroad Co. vs. Conroy, *infra,* p. 429.

These two theories, "the department theory" and "the doctrine of vice-principal," by which "the rigor of the rule of fellow-servant has been assuaged," are stated, and their application is considered, in the prevailing opinion of BREWER, J., and in the dissenting opinion of WHITE, J., (now C. J.), in a case holding that a telegraph operator by whose negligence is caused a collision of trains, is a fellow-servant with a trainman injured by the collision, and not a vice-principal or in a different department so as to render the company liable:

Railway Co. vs. Dixon, 194 U. S. 338.

With this case, however, should be compared that, cited below, of

Railroad Co. vs. Holmes, 202 U. S. 438.

The Established Doctrine in the Federal courts and in most of the States is that the master is liable for injuries done by one fellow-servant to another only in a case where the offending servant is delinquent in the discharge of some duty

which is owed by the master himself to the injured fellow-servant, and which the master has entrusted to the offending servant.

Those duties which the master, in virtue of the relationship, owes to the servant—such as that of providing of a safe place to work, safe tools, and competent fellow-servants—are incumbent upon the master personally, and he cannot relieve himself of responsibility in respect of such duties by delegating the discharge of them to others. If he commits to another person the function of making and keeping safe the place of work and the tools, and the duty is neglected so that a servant is injured, the delinquent representative of the master may or may not be a fellow-servant of the injured servant; but in either case the delinquency is in a duty owed by the master himself, and he is liable without regard to the existence or non-existence of fellow-service:

Hough vs. Railway Co., *infra,* p. 423.

Thus, it being the duty of the master to provide the servant with safe machinery for his work, the providing a brakeman with a defective brake, whereby he was injured, is a default for which the master is liable; and his liability is not affected by the fact that the duty of repairing the brake had been entrusted to an employe who was a fellow-servant of the injured brakeman:

Railroad Co. vs. Herbert, *infra,* p. 420;
Railroad Co. vs. Babcock, 154 U. S. 190.

So, where a trainman was injured by the breaking of a defective wheel, which had been overlooked because of negligent inspection, the delinquency of the inspector was a default in a duty incumbent upon the company as master, and it was therefore liable for the injury thereby resulting to the trainman:

Railway Co. vs. Daniels, 152 U. S. 684.

The negligence of a train dispatcher, whereby two trains are brought into collision and a trainman is injured, is a neglect of

the master's duty to keep the place of work in a safe condition, and the company is not relieved of liability by the fact that the dispatcher and the injured employe are fellow-servants:

Railroad Company vs. Holmes, 202 U. S. 438.

Where the defendant railway company employed a telegraph operator known to be incompetent, and by reason of his negligence a collision of trains was caused whereby one of the trainmen was injured, the company was liable to the injured employe because of its negligence in providing an incompetent fellow-servant:

Railway Co. vs. McDaniels, 107 U. S. 454.

Liability for Acts of Servant.

Gregory vs. Piper, 9 B. & C. 591. King's Bench (1829).

The plaintiff and the defendant occupied adjoining yards, which were separated by a wall built upon the plaintiff's lot. The plaintiff, who was an innkeeper, claimed a right of way from the street over the defendant's yard to the stable of the inn. This right the defendant disputed; and, for the purpose of obstructing passage through his yard, employed a laborer to deposit a quantity of bricks, stones, mortar and other rubbish in his yard. The laborer was instructed not to let any of the rubbish touch the plaintiff's wall; and he had, accordingly, piled the materials at a distance of about a yard and a half from the wall. As the rubbish became dry, it naturally shingled down and ran against the wall, that being a result which, according to the testimony of the laborer, was to be expected from such a disposal of such materials. Gregory brought this action in trespass, alleging that Piper had cast, thrown, placed and deposited diverse large quantities of earth, stones, bricks and rubbish against the plaintiff's wall. At the trial, the facts as just stated being proved, the defendant insisted that the action was not maintainable, inasmuch as he had given express orders not to let the rubbish touch the wall, so that the actual result was due to the negligence of his servant; on which ground it was urged that the remedy was not trespass but case.

Held, however, that, since the contact with the wall was the necessary consequence of what the plaintiff had directed, he had committed trespass in directing the rubbish to be laid as it was.

BAYLEY, J.: The only question is, whether the trespass was the act of the master. The master desired the servant to lay down the rubbish so as not to let it touch or lean against the wall of the plaintiff. But, if in the execution of the order, it was the necessary or natural consequence of the act ordered to be done that the rubbish should go against the wall, the master is answerable in trespass.

LITTLEDALE, J.: If the servant, therefore, in carrying into execution the orders of his master, uses ordinary care, and an injury is done to another, the master is liable in trespass. If the injury arise from the want of ordinary care in the servant, the master will be liable only in case. Here the servant used ordinary care in the course of executing the master's order, and, notwithstanding that, the rubbish ran against the wall.

Limpus vs. General Omnibus Company, 32 L. J. Exchequer, 34 (1862).

The Omnibus Company prescribed a number of regulations for the conduct of its drivers, of which one was that a driver "must not, on any account, race with or obstruct another omnibus, or hinder or annoy the driver or conductor thereof in his business, whether such omnibus be one belonging to the company or otherwise." In violation of this rule, one of the company's drivers, for the sake of preventing the omnibus of another line from getting ahead of him, drew his omnibus across the road, whereby a collision resulted and the other omnibus was upset. In this disaster, Limpus, who was a passenger in one of the vehicles, was injured, and for that cause he sued the General Omnibus Company. The defence was that the company had forbidden its drivers to do anything which would cause such accidents, and that the driver had willfully disobeyed his orders.

Held, that the company was liable for the consequences of the driver's tortious misconduct, since, although he acted in violation of his master's orders, what he did was done in the course of his employment and for the intended advancement of the master's business.

Seymour vs. Greenwood, 6 H. & N. 359. Exchequer (1861). 7 H. & N. 354. Exchequer Chamber.

The defendant operated a line of omnibuses in the streets of Manchester. The plaintiff, being seriously intoxicated, entered one of these vehicles, refused to pay his fare, assaulted the guard, and was otherwise disorderly. The guard threw him into the street, where he was run over by a cab. As the guard had clearly used unnecessary violence and had put the plaintiff into a position of great danger, the only question was, whether the ejection of the plaintiff, in the manner in which it was done, was an act for which the proprietor of the omnibus was responsible. The Court of Exchequer held that the defendant was liable, and the judgment to that effect was affirmed by the Court of Exchequer Chamber. In the appellate court, it was said by

WILLIAMS, J.: We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed. We think there was evidence for the jury that the guard, acting in the course of his service as guard of the defendant's omnibus, and in pursuance of that employment, was guilty of excess and violence not justified by the occasion; or, in other words, misconducted himself in the course of his master's employment, and therefore the master is responsible. * * * It is said that, although it cannot be denied that the defendant authorized the guard to superintend the conduct of the omnibus generally, and that such authority must be taken to include an authority to remove any passenger who misconducts himself, yet the defendant gave no authority to turn out an inoffensive passenger, and the plaintiff was one. But the master, by giving the guard authority to remove offensive pasengers, necessarily gave him authority to determine whether any passenger had misconducted himself. It is not convenient for the master personally to conduct the omnibus, and he puts the guard in his place; therefore, if the guard forms a wrong judgment, the master is responsible.

Bergman vs. Hendrickson, 106 Wisconsin, 434 (1900).

The plaintiff while intoxicated entered the saloon of the defendant and purchased several drinks for himself and others, for which he refused to pay. The barkeeper, employed by the defendant, insisted upon payment, and the plaintiff became abusive; whereupon the barkeeper struck the plaintiff with a bungstarter, knocking him to the floor, injuring him severely. This action was brought against the proprietor for the tort of the barkeeper. The question left to the jury in the lower court was, whether the assault was the immediate consequence of the plaintiff's refusal to pay and an attempt to compel him to do so, or whether it was a personal act on the part of the bartender in resent-

ment of the insolence of the plaintiff. The jury found it to be the former. Verdict for plaintiff.

DODGE, J.: If Backstrom committed the assault for the purpose of collecting payment for his master's liquor, he was within the scope of his employment. It was his method of performing the duty delegated to him, and, although the method may not have been either expressly authorized or even contemplated—nay, altho it may have been expressly prohibited—yet the master is liable for the damages caused thereby, provided he has intrusted to the servant the duty he was attempting to perform. Craker vs. C. & N. W. R. Co., 36 Wis. 657; Schaefer vs. Osterbrink, 67 Wis. 495; Rogahn vs. Moore, M. & F. Co., 79 Wis. 573; Bryan vs. Adler, 97 Wis. 124. *Judgment affirmed.*

Axman vs. Washington Gaslight Company, 38 App. D. C. 150 (1912).

The defendant company supplied gas to the house occupied by Mr. and Mrs. AXMAN. Some of the company's inspectors conceived the suspicion that the meter in the house had been so tampered with that it did not register the full quantity of gas used, and on two occasions they applied to Mrs. Axman for leave to examine the meter. At both times Mrs. Axman declined to admit the inspectors, on the ground that her husband had the key to the cellar, where the meter was, and that he was not at home. The inspectors, three in number, made a third visit to the house for the same purpose, and were again, and on the same ground, denied admission. This time the men forced an entry through a window, against the opposition of Mrs. Axman, who was inadvertently struck and pushed aside, and to whom some profane language was addressed. That lady now sued the company for the assault, and her husband also brought an action for the trespass to his premises. There was no evidence that the company had directed or authorized the men to break into the house, or that their action in the matter had been afterwards approved by any of the superior officers of the company; and the defendant insisted that the trespass was the mere individual tort of the inspectors. But it was held that the company was liable, because the inspectors were its servants, acting in the course of their employment, which was to read meters, and the tortious means which they employed were their way of doing the business which the master had entrusted to them. The opinion reviews the leading cases on the subject.

Poulton vs. London and Southwestern Railway Company, L. R. 2 Q. B. 534. Queen's Bench (1867).

Mr. Poulton, a horse dealer, took a horse to the Salisbury Agricultural Show, and, after winning any number of prizes, returned with it to Romsey. When he arrived at his destination he gave up a ticket for himself, and a certificate for his horse.

This, however, did not satisfy the station-master, who called upon him to pay 6s. 10d. for the carriage of the horse, under a mistaken notion that it could not be carried free by that train. Poulton refused to pay this sum, and was consequently arrested by a couple of policemen acting under the station-master's orders, and detained in custody till it was found by telegraphing that Poulton was right and the station-master wrong.

The injured horse dealer now brought an action against the railway company for false imprisonment, but was bowled over on a point of law. They successfully answered his claim by saying that, as they themselves would have had no right to apprehend the plaintiff for not paying his horse's fare, so their servant the station-master could have had no implied authority from them to do what he did.* (Shirley's Leading Cases, 294.)

Roche vs. Washington Gas Light Company, 43 App. D. C. 562 (1915).

One Emory was employed by the Gas Light Company as superintendent of complaints, meters and installation, in which capacity he had charge and supervision of certain portions of the company's property and business, and had also oversight and control of several subordinate employees, whom he had authority to direct and to discharge. Among these subor-

*"A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances which arise, when an act of that class is to be done, and trusts him for the manner in which it is done. Thus, in an action for assault, a railway company was held liable for the violence of a porter who roughly pulled a passenger ont of a carriage because he thought that it was the wrong compartment [Bayley vs. Ry. Co., L. R. 7 C. P. 415]. And where the superintendent at a railway station without reasonable cause gave a passenger into custody for travelling without a ticket, and an Act of Parliament authorized this to be done in the case of passengers travelling without having paid their fare, the company was held liable [Goff vs. Ry. Co., 3 E. & E. 672]. But it is not within the ordinary scope of a bank manager's authority to order the arrest or prosecution of offenders [Bank vs. Owston, L. R. 4 App. Cas. 270], nor has the booking-clerk of a railway company authority to give into custody a person whom he suspects of attempting to rob the till, after the attempt has ceased [Allen vs. Ry. Co., L. R. 6 Q. B. 25]. Similarly, a railway porter left in charge of a station does not render the company liable in an action for false imprisonment when he gives an innocent person into custody on the charge of stealing the company's property [Edwards vs. Ry. Co., L. R. 5 C. P. 445]. There seems no ground for saying, remarked KEATING, J., that what was done was in the ordinary course of the business of the company, nor that it was for their benefit, except in so far as it is for the benefit of all the Queen's subjects that a criminal should be convicted. In the recent case of Richards vs. The West Middlesex Waterworks Company [15 Q. B. D. 660], it was held that a bailiff who committed an unnecessary assault in levying a distress was not acting within the scope of his authority and did not make his employers responsible. See also Furlong vs. South London Tramways Co., 1 C. & E. 316." Shirley, Leading Cases, 297.

dinates of Emory were one Blackman and the plaintiff Roche, the latter of whom had the care of the stable and also of a boiler, with which it was his duty to melt considerable quantities of lead for use in the business of the company. For some time various articles had been missed from the boiler-room and neighboring parts of the establishment. At length Blackman saw a colored man named Posey carrying off a saddle from the stable. Blackman reported this fact to Emory, who consulted with the president of the company, and, on returning from the president's office, directed Blackman to swear to a warrant for the arrest of Posey, and to do whatever the police officers requested. In consequence. Posey was arrested, and also another colored man named Green, and it developed that both of them had been concerned in carrying quantities of lead from the company's works and selling it at a junkshop. Both freely admitted that they had done this, but both asserted that they had been entrusted with the lead by Roche to sell for him, and that they had accounted to him for the proceeds. Upon these statements, the police officers arrested Roche on a charge of larceny, and an information against him was sworn to by Blackman, who also, by the direction of Emory, appeared at the trial of the three men to testify to the identity and value of the property alleged to be stolen. Some other circumstances were relied upon by counsel for the plaintiff as establishing the concern of Emory in procuring the arrest and prosecution of Roche, who was acquitted at the trial. Roche sued the Gas Light Company for malicious prosecution, conceiving that the defendant was liable for the charge made against him.

Held, that, since it did not appear to be within the scope of Emory's authority as an employee of the defendant to cause the arrest of anybody, nor did it appear that the company had authorized or ratified what he had done in relation to the plaintiff, the company was not liable for Emory's supposed wrongful action in causing the plaintiff to be arrested.

SHEPARD, C. J.: The principle is well settled that, where a corporation is sought to be held liable for the wrongful or malicious act of its agent or servant for putting the criminal law in operation upon a charge of larceny, it should be made to appear that he was expressly authorized to act as he did by the corporation, or that the corporation ratified his act. Lake Shore & M. S. R. R. Co. vs. Prentice, 147 U. S. 101; Washington Gas Light Co. vs. Lansden, 172 U. S. 534; Bank of New South Wales vs. Owston, L. R. 4 App. Cas. 270; Allen vs. L. & S. W. R. Co., L. R. 6 Q. B. 65; Mulligan vs. N. Y. & R. B. R. R. Co., 129 N. Y. 506; Carter vs. Howe Machine Co., 51 Md 290; Road vs. Green, 86 Md. 161; Beiswanger vs. American Bonding & T. Co., 98 Md. 287; Markley vs. Snow, 207 Pa. St. 447.

Emory was the superintendent of one of the departments of the gas company over which he had a general authority to look after and protect the property in his charge and possession, and all the ordinary authority connected with that position, yet he was not empowered to put the law in motion against one suspected of the theft of that property unless he had express precedent authority. He showed his knowledge

of this want of authority by procuring the express direction of the president of the company, who occupied the same building, before authorizing the arrest of Posey.

Assuming that the evidence has a tendency to show that he authorized Blackman to prosecute Roche, there is nothing to show that the corporation either directed him to act, or approved and ratified his act after it was done.

McManus vs. Crickett, 1 East, 106. King's Bench (1800).

The defendant's coachman willfully drove his master's carriage against a chaise in which the plaintiff was riding. The defendant was not at the time in his carriage and had not in any way directed or approved the act of his servant, which seemed to have been merely malicious. The plaintiff sued the master in trespass, alleging that the defendant had with force and arms driven his carriage against that of the plaintiff. *Held,* that trespass would not lie against the master in such a case.

LORD KENYON, C. J.: Now, when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of LORD HOLT, his master will not be answerable for such act. * * * This doctrine does not at all militate with the cases in which a master has been holden liable for the mischief arising from the negligence or unskillfulness of his servant who had no purpose but the execution of his master's orders; but the form of those actions proves that this action of trespass cannot be maintained; for if it can be supported, it must be upon the ground that in trespass all are principals; but the form of these actions shews that, where the servant is in point of law a trespasser, the master is not chargeable as such, though liable to make a compensation for the damage consequential from his employing of an unskillful or negligent servant. The act of the master is the employment of the servant; but from that no immediate prejudice arises to those who suffer from some subsequent act of the servant. If this were otherwise, the plaintiffs in the cases mentioned in 1 LORD RAYMOND, 739 [Anonymous]—one were the servants of a carman through negligence ran over a boy in the streets and maimed him, and the other where the servants of A. with his cart ran against the cart of B. and overturned it, by which a pipe of wine was spilt—must have been nonsuited from their mistaking the proper form of action, in bringing an action upon the case instead of an action of trespass; for there is no doubt of the servants in those cases being liable as trespassers, even though they intended no mischief; for which, if it were necessary, Weaver vs. Ward, in Hobart, 134, and Dickinson vs. Watson, in Sir Thomas Jones, 205, are authorities. But it must not be inferred from this that, in all cases where an action is brought against

a servant for improperly conducting his master's carriage, by which mischief happens to another, the action must be trespass. Michael vs. Alestree, in 2 Levinz, 172, where an action on the case was brought against a man and his servant for breaking a pair of horses in Lincoln's Inn Fields, where being unmanageable they ran away with the carriage and hurt the plaintiff's wife, is an instance to shew that trespass on the case may be the proper form of action.

Croft vs. Alison, 4 B. & Ald. 590. King's Bench (1821).

The defendant was in his carriage, which was driven by his coachman, when the wheels of the vehicle became entangled with those of a carriage occupied by the plaintiffs. The defendant's coachman, for the purpose of causing the plaintiffs' carriage to move, struck the horses attached thereto, whereby damage resulted to the plaintiffs. The defendant, being sued for the improper management of his vehicle, the plaintiffs obtained a verdict. And it was said,

PER CURIAM: The distinction is this: If a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person and produce an accident, the master will not be liable. But if, in order to perform his master's orders, he strikes, but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment.

Quarman vs. Burnett, 6 M. & W. 499. Exchequer (1840).

The case is thus stated by Mr. Shirley in his Leading cases:

The defendants were a couple of elderly ladies residing in Moore Place, Lambeth. They kept a carriage of their own, but neither horses nor coachman, and they were in the habit of hiring both from a job-mistress named Mortlock. They generally had the same horses, and always the same coachman, a steady, respectable person named Kemp. They paid him 2s. a week, but he received regular wages from Miss Mortlock. The man had a regular Burnett livery, which he always put on when he drove the elderly ladies, and which used to hang up in their hall.

A day or two before Christmas Day, 1838, Kemp drove the Miss Burnetts out as usual, and after depositing them at their door went in himself to leave his livery. He knew the horses

well, and trusted them to stand still while he was changing his coat. His confidence, however, was misplaced. The horses got frightened at something, and bolted, finally upsetting the plaintiff and severely injuring him.

The question now was whether Kemp was the servant of the Burnetts, so as to make them responsible for what had happened, on the principle *respondeat superior.* Counsel for the plaintiff make great capital out of the livery, the weekly payments, and similar circumstances tending to show that the defendants were the *dominae pro tempore;* but in the end it was held that they were not liable.

PARKE, B.: * * * For the plaintiff it was contended, that they were liable for the coachman's neglect, independently of the special circumstances of the case; and that there were besides two special grounds, on which the defendant ought to be held responsible. First, that there was evidence to go to a jury of selection and choice by the defendant of the particular coachman, so as to make him their servant; and, secondly, that when the coachman went in to leave his hat, he was, in so doing, acting as the servant of the defendants, and therefore his neglect was theirs. * * * It is undoubtedly true that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like. As to the supposed choice of a particular servant, my Brother Maule thought there was *some* evidence to go to the jury of the horses being under the defendant's care, in respect of their choosing this particular coachman. We feel a difficulty in saying that there was any evidence of choice, for the servant was the only regular coachman of the job-mistress' yard; when he was not at home, the defendants had occasionally been driven by another man, and it did not appear that at any time since they had their own carriage, the regular coachman was engaged, and they had refused to be driven by another; and the circumstance of their having a livery, for which he was measured, is at once explained by the fact, that he was the only servant of Miss Mortlock ever likely to drive them. Without, however, pronouncing any opinion upon a point of so much nicety, and so little defined, as the question whether there is *some* evidence to go to a jury, of any fact, it seems to us that if the defendants had asked for this particular servant, amongst many, and refused to be driven by any other, they would not have been responsible for his acts and neglects. If the driver be the servant of a job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, when there is a choice amongst them, any more than a hack post-boy ceases

to be the servant of an inn-keeper, where a traveller has a particular preference of one over the rest, on account of his sobriety and carefulness. If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants, but by a stranger to the job-master, appointed by themselves, it would have made all the difference. Nor do we think that there is any distinction in this case, occasioned by the fact that the coachman went into the house to leave his hat, and might therefore be considered as acting by their directions, and in their service. There is no evidence of any special order in this case, or of any general order to do so, at all times, *without leaving any one at the horse's heads.* If there had been any evidence of that kind, the defendants might have been well considered as having taken the care of the horses upon themselves in the meantime. * * * The immediate cause of the injury is the personal neglect of the coachman, in leaving the horses, which were at the time in his immediate care. The question of law is, whether any one but the coachman is liable to the party injured; for the coachman certainly is. Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servants; and that person is undoubtedly liable, who stood in the relation of master to the wrongdoer—who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference.

But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as LORD CHIEF JUSTICE EYRE says in the case of Bush vs. Steinman, 1 Bos. & P. 404, and cannot be maintained to its full extent, without overturning some decisions, and producing consequences which would, as LORD TENDERDEN observes, "shock the common sense of all men." * * *

We are therefore of opinion that the defendants were not liable in this case.

Laugher vs. Pointer, 5 B. & C. 547. King's Bench (1826).

The defendant, a gentleman usually residing in the country, being in town for a few days with his own carriage, hired of a stable-keeper a pair of horses, together with a driver, for a day. The defendant did not select the driver and had no previous knowledge of him. The driver

had no wages from the stable-keeper, and no contract for pay with the defendant, but depended for his compensation upon such gratuities as those for whom he drove chose to give him. In this case the defendant gave him five shillings. Through the negligence of the driver, the defendant's carriage was brought into collision with a horse belonging to the plaintiff, who sued Pointer for the damage thereby occasioned. There being a difference of opinion among the judges of the King's Bench, the case was directed to be argued before the twelve judges constituting the three common law courts, and the argument was heard by all of them except one. Their opinion was not unanimous; but the majority held that the defendant was not liable.

LITTLEDALE, J.: For the acts of a man's own domestic servants there is no doubt but the law makes him responsible. And, if this accident had been occasioned by a coachman who constituted a part of the defendant's own family, there would be no doubt of the defendant's liability; and the reason is, that he is hired by the master, either personally or by those who are entrusted by the master with the hiring of servants, and he is therefore selected by the master to do the business required of him.

The rule applies not only to domestic servants who may have the care of carriages, horses and other things in the employ of the family, but extends to other servants whom the master or owner selects and appoints to do any work or superintend any business, although such servants be not in the immediate employ or under the superintendence of the master. As, for instance, if a man is the owner of a ship, he himself appoints the master and desires the master to appoint and select the crew; the crew thus becomes appointed by the owner, and are his servants for the management and government of the ship; and if any damage happens through their default, it is the same as if it had happened through the immediate default of the owner himself. So the same principle prevails if the owner of a farm has it in his own hands, and he does not personally interfere in the management, but appoints a bailiff or hind who hires other persons under him, all of them being paid out of the funds of the owner, and selected by a person specially deputed by him; if any damage happen through their default, the owner is answerable, because their neglect or default is his, as they are appointed by and through him. So, in the case of a mine, the owner employs a manager or steward to superintend the working of the mine and to hire under workmen, and he pays them on behalf of the owner. These under workmen then become the immediate servants of the owner, and the owner is answerable for their default in doing acts on account of their employer.

This, however, is not the case of a man employing his own immediate servants, either domestic servants or others, engaged by him to conduct any business or employment or occupation carried on by him. For the jobman was a person carrying on a distinct employment of his own, in which he furnished men and let out horses to hire to all such persons as chose to employ him. This coachman was not hired by the defendant; he had no power to dismiss him. He paid him no wages. The

man was only to drive the horses of the jobman. It is true the master paid him no wages, and the whole which he got was from the person who hired the horses; but that was only a gratuity. It is the case with servants at inns and hotels. Where there is a great deal of business, they frequently receive no wages from the owner of the inn or hotel, and trust entirely to what they receive from the persons who resort to the inn or hotel; and yet they are not the less the servants of the innkeeper; they are not servants upon wages, but servants upon the expectation of gratuities. And, therefore, if the defendant in this case is to be answerable for the acts of the driver provided by the jobman, it must be upon this principle, that, if a man, either for his benefit or pleasure, employs an agent to conduct any business, such agent is to be looked upon in the same light as if he were the immediate servant of the employer. * * * And that the only thing to be looked to is, whether in the end the principal pays for the employment in the course of which the injury is occasioned. But I think that, upon principle, this rule cannot be carried so far.

Joel vs. Morrison, 6 C. & P. 501. Nisi Prius (1834).

The defendant used in his business a cart which was regularly driven by servants of his between Burton Crescent Mews and Finchley, and for which there was never any occasion, on account of the defendant's affairs, to go into or near to Bishopsgate street. The plaintiff was knocked down by this cart in Bishopsgate street, and sustained a fracture of the fibula. Counsel for the plaintiff suggested that either the defendant's servants might in coming from Finchley have gone out of the direct route for their own purposes, or they might have taken the cart when it was not wanted for the needs of the business and have gone to pay a visit to a friend; in either of which cases counsel contended that the defendant was liable. To which it was answered by the judge presiding,

PARKE, J.: He is not liable if, as you suggest, these young men took the cart without leave. He is liable if they were going *extra viam* in going from Burton Crescent Mews to Finchley; but if they chose to go of their own accord to see a friend, when they were not on their master's business, he is not liable. . . .

[To the Jury]: If the servant, being on the master's business, took a detour to call upon a friend, the master will be responsible. If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or if you think that the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable The master is liable only where the servant is acting in the course of his

employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable. As to the damages, the master is not guilty of any offence; he is only responsible in law; therefore the amount should be reasonable.

Verdict for the plaintiff; damages £30.

Sleath vs. Wilson, 9 C. & P. 607. Nisi Prius (1839).

The defendant, having alighted from his carriage at the house of a friend in Great Stamford Street, directed his driver to take the carriage to a stable in Castle Street and there put up the horses. The driver started in the direction of Castle Street, but soon turned from the direct route to the stable and drove to a point about four miles out of the way, for the sake of delivering a parcel which his wife had sent by him to her mother. In returning toward the stable, the driver negligently ran over the plaintiff. *Held,* that the defendant was liable, the driver having been at the time of the accident engaged in executing the order of his master.

ERSKINE, J.: It is quite clear that, if a servant, without his master's knowledge, takes his master's carriage out of the coach-house and with it commits an injury, the master is not liable; and on this ground, that the master has not intrusted the servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage, it is no answer, that the servant acted improperly in the management of it. If it were, it might be contended that, if a master directs his servant to drive slowly, and the servant disobeys his orders and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law; the master in such a case will be liable, and the ground is, that he has put in the servant's power to mismanage the carriage by intrusting him with it. And in this case, I am of opinion that the servant was acting in the course of his employment. and, till he had deposited the carriage in the Red Lion stables, in Castle street in Leicester Square, the defendant was liable for any injury which might be committed through his negligence.

Mitchell vs. Crassweller, 13 C. B. 237. Common Pleas (1853).

The defendants were ironmongers in Welbeck Street and used a cart for the delivery of goods sold to customers. The driver of this cart, having finished his day's work, returned at

a late hour in the evening to the shop for the purpose of getting the key to the stable and putting up the cart and the horse. The foreman of the shop, being indisposed, requested the driver to take him to his home, and this the driver did, without having obtained permission so to do from any member of the firm. After taking the foreman home, the driver in returning ran over the plaintiff and his wife.

Held, that the defendants were not liable for the accident, the driver not having been at the time in the course of his employment.*

JERVIS, C. J.: Each case must depend upon its own particular circumstances. No doubt a master may be liable for injury done by his servant's negligence where the servant, being about his master's business, makes a small deviation, or even when he so exceeds his duty as to justify the master in at once discharging him. But here it cannot be

*In order that a master may be responsible for a tort committed by his servant, the latter must in general have been acting in the course of his regular employment. If while driving me, or driving on my business, my servant negligently injures a person, I am clearly liable. So am I even if the accident occurs while the servant is temporarily deviating for a purpose of his own. A contractor gave strict orders to his workmen that they were not to leave their horses, or to go home during the dinner hour. One of them, however, disobeyed these orders, and went home to his dinner a quarter of a mile off, leaving his cart and horse standing unattended outside. They ran away, and injured the plaintiff's railings. The man's master was held responsible, on the ground that the workingman was acting within the general scope of his authority to conduct the horse and cart during the day [Whatman vs. Pearson, L. R. 3 C. P. 422].

But if the enterprise is entirely the servant's—if, for instance, he takes his master's carriage without leave for purposes entirely his own—the master is not responsible. One May Saturday in 1869 a city wine merchant sent a clerk and carman with a horse and cart to deliver wine, at Blackheath, and to bring back a quantity of empty bottles to the offices, which were the Minories. On the homeward journey, after crossing London Bridge, they should have turned to the right; instead of that they turned to the left, and went in the opposite direction on some private matter of the clerk's. While thus going quite against their orders, they ran over a child. It was held that the city wine-merchant was not responsible [Storey vs. Ashton, L. R. 4 Q. B. 476].

It is obvious, however, that these two cases run somewhat fine.

A recent case on this subject is Stevens vs. Woodward [6 Q. B. D. 318]. The plaintiffs were the well-known law publishers carrying on business at 119 Chancery Lane, and the defendants were some solicitors occupying premises over their shop. In the private room of one of the defendants was a lavatory, which the clerks had clear instructions never to use. One afternoon, however, after this gentleman had left, a disobedient clerk, thinking no one would ever know, went into the room to wash his hands. "I turned the tap," the young man afterwards said in evidence, "and the water did not flow; and then I went out." But after the youth had gone out, the water did flow, and flowed so abundantly that a large number of treatises of Messrs. Stevens and Sons down below were spoilt. In an action against the solicitors for the mischief thus inflicted, it was held that the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment, and therefore his masters were not liable. "The clerk," said LINDLEY, J., "was a trespasser after his master had left." (Shirley, Leading Cases, p. 295.)

denied that, though it was the duty of the carman, on his arrival with the horse and cart at Welbeck street immediately to take them to the stable, he, in violation of his duty, and without the sanction or knowledge of his employers, instead of going to the stable, started on a new journey wholly unconnected with his master's business—as my brother PARKE expresses it in Joel vs. Morrison, "on a frolic of his own," I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words, he must be in the employ of his master at the time of committing the grievance.

CRESWELL, J.: No doubt, if a servant, in executing the orders, express or implied, of his master, does it in a negligent, improper and roundabout manner, the master may be liable. But here the man was doing something which he knew to be contrary to his duty and in violation of the trust reposed in him.

MAULE, J.: At the time of the accident he was not going a roundabout way to the stable, or, as one of the cases expresses it, making a detour. He was not engaged in the business of his employers. * * * The master is liable, even though the servant, in the performance of his duty, is guilty of a deviation or a failure to perform it in the strictest and most convenient manner. But where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it.

Denver and Rio Grande Railway vs. Harris, 122 U. S. 597. (1887).

The Atchison, Tokepa and Santa Fé Railway Company was, in 1879, in possession of a line of railway extending from Pueblo to Alamosa in Colorado. The Denver and Rio Grande Company, intending to gain possession of the road, collected, organized and armed a body of several hundred men; and this force, acting under the direction of the vice-president and the assistant general manager of the Denver and Rio Grande corporation, attacked with deadly weapons the employés of the Santa Fé Company who were in charge of the road, drove them from their places by a demonstration of armed force along the whole line, and took and afterwards held possession of the track. Harris, the plaintiff in the court below, was in the employ of the Santa Fé and was in charge of a gang of men who also were employed on the road. These men were attacked and fired upon by a body of the Rio Grande forces. Harris ordered the

fire to be returned; and in the engagement which ensued he was shot and permanently injured. In this action brought by him against the Denver and Rio Grande Company, the trial court authorized the jury to return a verdict in his favor, not only for such amount as would compensate him for the actual injuries sustained by him, but for "punitive or exemplary damages if it was found that the defendant acted with bad intent, and in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by the other company." The jury gave Harris a verdict for $9,000, on which judgment was entered; and this judgment was affirmed by the Supreme Court of the United States.

HARLAN, J.: It appears in proof, as stated by the court below, that the Atchison, Topeka and Santa Fe Railroad Company was in the actual, peaceable possession of the road when the other company, by an armed body of men, organized and under the command of its chief officers, proceeded in a violent manner to drive the agents and servants of the former company from the posts to which they had been respectively assigned. It was a demonstration of force and violence, that disturbed the peace of the entire country along the line of the railway, and involved the safety and lives of many human beings. It is a plain case, on the proof, of a corporation taking the law into its own hands, and, by force and the commission of a breach of the peace, determining the question of the right of the possession of a public highway established primarily for the convenience of the people. * * *

In Philadelphia, Wilmington and Baltimore Railroad vs. Quigley, 21 How. 202, this court held that a railroad corporation was responsible for the publication by them of a libel, in which the capacity and skill of a mechanic and builder of depots, bridges, station-houses and other structures for railroad companies were falsely and maliciously disparaged and undervalued. The publication in that case consisted in the preservation, in the permanent form of a book for distribution among the persons belonging to the corporation, of a report, made by a committee of the company's board of directors, in relation to the administration and dealings of the plaintiff as a superintendent of the road. The court, upon a full review of the authorities, held it to be the result of the cases, "that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances. * * *

The court [in this case] also instructed the jury that they were not limited to compensatory damages, but could give punitive or exemplary damages if it was found that the defendant acted with bad intent, and in pursuance of an unlawful purpose to forcibly take possession of the railway occupied by the other company, and in so doing shot the plaintiff,

causing him incurable and permanent injury; always bearing in mind that the total damages could not exceed the sum claimed in the declaration. This instruction, the company contends, was erroneous. Its counsel argued that, while a master may be accountable to an injured party to the extent of compensatory damages for the wrongful acts of his servant—provided the servant is acting within the general scope of his employment in committing the injury—even though the master may not have authorized, or may even have forbidden, the doing of the particular act complained of, yet he cannot be mulcted in exemplary damages unless he directed the servant to commit the special wrong in question in such manner as to personally identify himself with the servant in the perpetration of the injurious act.

The right of the jury in some cases to award exemplary or punitive damages is no longer an open question in this court. In Day vs. Woodworth, 13 How. 363, which was an action of trespass for tearing down and destroying a mill-dam, this court said that, in all actions of trespass and all actions on the case for torts, "a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff," and that such exemplary damages were allowable "in actions of trespass where the injury has been wanton or malicious, or gross and outrageous." The general rule was recognized and enforced in Philadelphia, Wilmington and Baltimore Railroad Co. vs. Quigley, which, as we have seen, was an action to recover damages against a corporation for a libel; in the latter case the court observing that the malice spoken of in Day vs. Woodworth was not merely the doing of an unlawful or injurious act, but the act complained of must have been conceived "in the spirit of mischief or of criminal indifference to civil obligations." * * *

The doctrine of punitive damages should certainly apply in a case like this, where a corporation, by its controlling officers, wantonly disturbed the peace of the community, and by the use of violent means endangered the lives of citizens in order to maintain rights, for the vindication of which, if they existed, an appeal should have been made to the judicial tribunals of the country. That the defendant, within the meaning of the rule holding corporations responsible for the misconduct of their servants in the course of its business and of their employment, directed that to be done which was done, is not to be doubted from the evidence, the whole of which is given in the bill of exceptions. Its governing officers were in the actual command and directing the movements of what one of the witnesses described as "the Denver and Rio Grande forces," which were avowedly organized for the purpose of driving the other company and its employes, by force, from the possession of the road in question.

Lake Shore and Michigan Southern Rwy. Co. vs. Prentice, 147 U. S. 101 (1893).

Prentice, a physician of Norwalk, Ohio, became a passenger with his wife upon a train of the Lake Shore Company, having excursion tickets from Norwalk to Chicago. During the journey he bought of several other passengers their return tickets, which had nothing on them to show that they were not transferable, such a transaction being at that time not unlawful. The conductor of the train, however, upon learning of what Prentice had done, telegraphed to Chicago for a police officer in the company's employ, who boarded the train as it approached that city. Thereupon the conductor, in a loud and angry voice, pointed out Prentice to the officer and ordered the latter to arrest him. The officer, having no warrant or other legal authority, seized Prentice, rudely searched him for weapons, hurried him into another car, there sat down by him and refused to tell him the cause of his arrest or to let him speak to his wife. The conductor availed himself of the occasion to announce to the other passengers that Prentice had been arrested and to Mrs. Prentice he said sneeringly, "Where's your doctor now?" Upon the arrival of the train at Chicago, Prentice was taken by the officer to a police station, without having been allowed to assist his wife with her baggage or even to give her the check for their trunk. At the station-house, the employés of the company charged Prentice with disorderly conduct, on which charge he gave bail; and on the next day he was brought for trial before a magistrate, whereupon he was discharged, no one appearing to prosecute.

Prentice sued the company at Chicago in an action of trespass on the case. At the trial, counsel for the defendant admitted that the arrest was wrongful and that the company was liable for the actual damage sustained by the plaintiff on account of his being arrested. Prentice, however, insisted upon recovering punitive damages; and the court, being of opinion that he was entitled to do so, after instructing the jury to ascertain what sum would compensate the plaintiff for the actual injury, proceeded to tell them:

"And, further, after agreeing upon the amount which will fairly compensate the plaintiff for his outlay and injured feelings, you may add something by way of punitive damages against the defendant, which is sometimes called smart money, if you are satisfied that the conductor's conduct was illegal (and it was illegal), wanton and oppressive, . . . If a public corporation, like an individual, acts oppressively, wantonly, abuses power, and a citizen in that way is injured, the citizen, in addition to strict compensation, may have, the law says, something in the way of smart money, something as punishment for the oppressive use of power."

The jury allowed the plaintiff $10,000, which the court reduced to $6,000, and for the latter sum gave him judgment.

This judgment was reversed on the ground that the trial court had erred in authorizing the jury to award damages beyond the amount requisite to compensate the plaintiff for the actual injury sustained by him.

GRAY, J.: In this court the doctrine is well settled, that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. But such guilty intention on the part of the defendant is required in order to charge him with exemplary or punitive damages: The Amiable Nancy, 3 Whtn., 546; Day vs. Woodworth, 13 How. 363; R. R. Co. vs. Quigley, 21 How. 202; Rwy. Co. vs. Arms, 91 U. S. 489; R. R. Co. vs. Harris, 122 U. S. 597 [and other cases].

Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agents within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of Amiable Nancy, 3 Whtn., 546. * * *

The rule has the same application to corporations as to individuals. * * * A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal: R. R. Co. vs. Derby, 14 How. 468; Steamboat Co. vs. Brockett, 121 U. S. 637; Howe vs. Newmarch, 12 Allen, 49; Ramsden vs. R. R. Co., 104 Mass. 117. A corporation may even be

held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation: R. R. Co. vs. Quigley, *supra;* Sale Lake City vs. Hollister, 118 U. S. 256; Reed vs. Savings Bank, 130 Mass. 433 [and other cases]. But, as well observed by MR. JUSTICE FIELD, now Chief Justice of Massachusetts:

"The logical difficulty of imputing the actual malice or fraud of an agent to his principal is perhaps less when the principal is a person than when it is a corporation; still the foundation of the imputation is, not that it is inferred that the principal actually participated in the malice or fraud, but, the act having been done for his benefit by his agent, acting within the scope of his employment in his business, it is just that he should be held responsible for it in damages:" Lothrop vs. Adams, 133 Mass. 471.

Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate. * * *

In the case at bar, the plaintiff does not appear to have contended at at the trial, or to have introduced any evidence tending to show, that the conductor was known to the defendant to be an unsuitable person in any respect, or that the defendant in any way participated in, approved or ratified his treatment of the plaintiff; nor did the instructions given to the jury require them to be satisfied of any such fact before awarding punitive damages. But the only fact which they were required to find, in order to support a claim for punitive damages against the corporation, was that the conductor's illegal conduct was wanton and oppressive. For this error, as we cannot know how much of the verdict was intended by the jury as compensation for the plaintiff's injury and how much by way of punishing the corporation for an intent in which it had no part, the judgment must be reversed, and the case remanded to the Circuit Court, with directions to set aside the verdict and to order a new trial.

A. S. Abell Company vs. Ingham, 43 App. D. C. 582 (1915).

Ingham was the superintendent of insurance of the District of Columbia. In the Baltimore Sun, a newspaper conducted by the A. S. Abell Company, was published a dispatch from Washington stating that there was in that city "an impending insurance scandal," involving grave fraudulent practice on the part of two large insurance companies, and threatening to "entangle a United States senator, a member of the District bench, and an official of the District other than the insurance superintendent." The article stated also that Ingham had been removed from office, that fact being so asserted as to imply quite clearly that the removal was on account of Ingham's concern in the scandalous transactions and as the result of some discreditable discoveries affecting him.

Ingham had not been, nor was he thereafter, removed from office; and, as a result of a congressional investigation of the supposed insurance scandal, he was acquitted of all misconduct in the matters investigated. About three months after the publication above mentioned, the Sun published a corrective article, stating that the report of Ingham's removal was an error and expressing the regret of the newspaper that such report had been published.

Ingham sued the publishing company for libel. The defendant, being unable to prove the truth of its article, offered evidence going only in mitigation of damages. It was made to appear that the Washington correspondent of the Sun, a Mr. Essary, had received from a member of Congress and from other apparently trustworthy sources information that Ingham had been removed from office; that neither the correspondent nor any one else connected with the Sun was acquainted with the plaintiff or had any ill-will toward him; and that, upon the attention of the editor being directed to the misstatement concerning Ingham, prompt correction had been made.

The jury returned a verdict for the plaintiff in the sum of $6,000, assessing $5,000 as compensatory damages and $1,000 as punitive damages. The trial court entered upon this verdict a judgment for $6,000. The Court of Appeals held that this was erroneous to the extent of the $1,000 allowed as punitive damages, the case being one within the rule that, for the tort of a servant, a master is liable only for compensatory damages.

Independent Contractors.

Deford vs. State, to the Use of Keyser, 30 Md. 179 (1869).

Deford, being the owner of a lot in Baltimore, employed one Robinson, an architect, to draw plans for a building to be erected on the lot and to superintend the construction. The plans were submitted to Deford, and approved by him, and Robinson commenced the construction under a contract whereby he was to employ all the workmen, and to buy all the materials, the wages of the men and the bills for the materials being paid by Deford upon orders from Robinson, and Robinson himself being paid by a commission of five per cent. calculated on the total cost of the building. Robinson employed a master-bricklayer named Thomas and two carpenters to work upon the structure, and Thomas employed a number of journeyman bricklayers and some hod-carriers. Both Robinson and Thomas appeared to be competent and skillful men. There was, however, some evidence tending to show that the building was

defectively constructed and had been recognized by the passing public as dangerous.

While the construction was in progress, a parade of cavalry passed through the adjoining street, attracting a large number of spectators, among whom was Mrs. Keyser. This lady was standing upon the pavement adjacent to the unfinished building of Deford when a portion of the wall, together with the cornice, fell outward into the street; and Mrs. Keyser, being beneath the falling material, was so severely injured that she died. At the time of the accident, neither Deford, Robinson nor Thomas was upon the building, the only persons there being a bricklayer and a hod-carrier who had been employed by Thomas.

This action was brought on behalf of Mrs. Keyser's surviving family to recover for her death. The defendant Deford contended that he was not liable for the accident because the delinquency to which that was due was the negligence or unskillfulness of Robinson or of Thomas, both of whom were independent contractors, or of their servants. Further than this, it was contended, there being some evidence to that effect, that the fall of the wall was not due to any negligence in construction but to extraordinary causes, the vibrations set up by the collection and movement of a large concourse of people, against which exceptional source of danger ordinary and reasonable prudence could not guard. The first trial of the case resulted in a verdict and a judgment against Deford, from which judgment he appealed, and in the Court of Appeals urged the contentions stated.

Held, (1) that Deford was not liable from the relation of master and servant, which relation did not exist, the persons employed to do the work being independent contractors;

(2) that, though the work was done by independent contractors, the employer would nevertheless be liable if the structure was so defective and so improperly erected that it was dangerous to the public; and,

(3) that, if the work was not thus dangerous, but the disaster was occasioned by extraordinary disturbances, of such

character that they could not be anticipated and guarded against by ordinary foresight and caution, Deford was not liable.

The case was, therefore, remanded for a second trial, to be conducted with regard to the principles thus laid down.

ALVEY, J.: While it is admitted that Mrs. Keyser, the mother of the *cestuis que use*, came to her death by the fall of defendant Deford's wall, the leading question in the case is, upon whom, of all the parties connected with the erection of the building, does the legal responsibility rest. * * * On the part of Deford, against whom alone the judgment below was obtained, it is contended, that he is not legally responsible for the accident that occurred, because, first, he did not bear the relation of master or principal to the parties, or any of them, whose acts and neglect are supposed to have produced the injury; and secondly, that the accident was produced by extraordinary causes, which, by the exercise of ordinary care and skill could not be avoided. * * * We may refer to Quarman vs. Burnett, 6 M. & W. 499, which is regarded as a leading case, and the one in which the present approved doctrine was first definitely established. In that case, the owners of a carriage were in the habit of hiring horses from the same person to draw it for a day or drive and the owner of the horses provided a driver, through whose negligence an injury was done to a third party; and it was held, that the owners of the carriage were not liable to be sued for such injury. * * * PARKE, B., said: "Upon the principle, that, *qui facit per alium, facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrong-doer; he, who had selected him as his servant, from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant had been appointed by the master directly, or intermediately through the intervention of an agent, authorized by him to appoint servants for him, can make no difference. But the liability, by virtue of the principle of relation of master and servant, must cease, where the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground, that the servant is the servant of another, and his act the act of another." * * * In Milligan vs. Wedge, 12 A. & Ell. 737, where a butcher bought a bullock in market, and employed a licensed drover to drive it home, and the drover employed a boy, by whose negligent driving the bullock was allowed to run into the plaintiff's show-room, and do considerable damage; it was held, that the butcher was not liable, as the drover exercised a distinct calling, and the boy whose negligent conduct caused the damage was *his* servant, and not the servant of the butcher, who was sought to be made responsible.

And, taking the later decisions, it results from them that the rule of *respondeat superior*, does not apply where the party employed to do the work, in the course of which the injury occurs, is a contractor, *pursuing an independent employment*, and, by the terms of the contract, is free to exercise his own judgment and discretion as to the means

and assistants that he may think proper to employ about the work, exclusive of the control and direction, in this respect, of the party for whom the work is being done. In such case, the workmen employed by the contractor are *his* servants, and he is liable for any negligence or unskillfulness in the course of their employment, and not the party engaging the contractor to execute the work. * * * And whether, in the case before us, the parties engaged in the erection of the will that fell, were the servants of Deford, depends upon the control and direction that he could rightfully exercise over them. If they were at his command and bound to obey his orders and directions, in regard to the work they were engaged in, and could be, at any time he thought proper, discharged by him, then they were his servants and he is liable for the consequences of their negligence and malfeasance committed in the course of their employment. * * * But although it may be that Deford is not liable for the acts of these parties by reason of any such relation as master and servant, it does not follow that he may not be responsible for the consequences resulting from the defective work allowed to be done by them. The wall was in course of erection on his premises, by his sanction, under his contract, and for his use and benefit. It was immediately fronting on a public street, in a large city, and if the testimony, offered on the part of the plaintiff, be true, it was constructed in a most defective and dangerous manner; so much so, that it excited the alarm and apprehension of hundreds of people as they passed, and caused them to avoid the pavement in its immediate front. If this be so, it certainly constituted a nuisance, for which Deford would be liable. And the fact that the wall was erected by others, under contract, and to whom he did not bear the relation of master, will not excuse him; for, as said by LORD CAMPBELL, in Ellis vs. Gas Co., 2 E. & B. 767, "If the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. And in all cases where a party is in possession of fixed property, he must take care that it is so used and managed that other persons shall not be injured; and whether it be managed by his own servants, or by contractors, or their servants, makes no difference in respect to his liability." * * * But it is contended on the part of the defendants, that the wall was erected of good materials, and with ordinary skill and care, and that its fall was occasioned not by neglect or defective work, but by the operation of extraordinary causes. * * * And if it be true, that by the operation of extraordinary causes, against which ordinary skill, care and foresight could not provide, the wall, erected in an ordinarily substantial and secure manner, was overthrown, it is clear the defendants would not be liable. Justice forbids that a party should be held liable under such circumstances. Blyth vs. Water Works Co., 36 E. L. & Eq. 506; Gault vs. Humes, 20 Md. 297.

Weilbacker vs. Putts Company, 123 Md. 249 (1914).

The defendant company desired to have the front of its six-story business house painted, and to that end employed a firm of master painters,

Crooks, Zick & Co., who contracted with the defendant to paint the building. Crooks, Zick & Co. put a number of journeyman painters upon the work; some of these workmen were negligent in fastening a scaffold which was used in the painting; and a part of the scaffold by reason of its insecure fastening, gave way and caused one of the workmen to fall to the street. Miss Weilbacker happened to be on the sidewalk and under the scaffold, and she was struck by the falling man and much injured. She sued the Putts Company, conceiving that the painters whose negligence had made the scaffold unsafe were servants of that company, and that it was liable to her for their default in doing the company's work.

Held, that Crooks, Zick & Co. were independent contractors, for the delinquencies of whose servants the defendant was not responsible, and that there was nothing in the nature or circumstances of the work contracted for which rendered the Putts Company liable to Miss Weilbacker for the torts of the independent contractor.

Burgess vs. Gray, 1 C. B. 578. Common Pleas (1845).

Gray owned a row of houses which had been built by a contractor named Palmer, and were but recently finished. As a part of the work a drain had been constructed from one of the houses to the sewer in the street, for which purpose Gray himself had applied for, and obtained, leave to break into the sewer. In making the drain a pile of earth and other rubbish had been thrown up at the side of the street; and Palmer, when he was leaving the work as completed, employed a laborer to remove this rubbish, for which the laborer was paid three shillings. Only a part, however, of the pile was removed, and, a day or two later, a policeman notified Gray that he must remove the remainder. This Gray said he would do as soon as he could; but this he had not done on the eighth day after Palmer's work was finished. In the evening of that day, the plaintiff was driving by the place, when his carriage ran over what was left of the pile and was upset, whereby he sustained injuries. The defence was that the existence of the obstruction was due to the neglect of Palmer, who was an independent contractor. The jury were told that, if the defendant had parted with all control over the work, he could not be held liable; but that, if he had himself exercised any control, he was responsible for the accident. *Held,* that this direction was proper; and judgment was rendered upon a verdict for the plaintiff.

TINDAL, C. J.: The only question in this case is, whether there was any evidence to leave to the jury. * * * Was there no evidence of personal interference on the part of the defendant? The drain was constructed under his order and for his benefit. He it was that applied to the commissioners of sewers for leave to break into the sewer. And there was the conversation with Barker, the policeman, before the accident, when the defendant, upon being told that the rubbish ought to be removed out of the road, said he would remove it as soon as he could This was an admission that he was exercising dominion over it. * * * All this is evidence that the soil was placed upon the road with the defendant's consent, if not by his express direction. I, therefore, think the case is taken out of the rule in Bush vs. Steinman, which is supposed to be inconsistent with the later authorities; and that it is brought clearly within the principle laid down by the Court of Exchequer in Quarman vs. Burnett.

Railroad Company vs. Hanning, 15 Wall. 649. Supreme Court of the United States (1872).

The New Orleans, Mobile and Chattanooga Railroad Company, being desirous to rebuild and enlarge its terminal wharf at New Orleans, entered into a contract with one Carvin of which contract the principal stipulations were these:

"Michael Carvin agrees to furnish the timber, planking and iron work and all the labor necessary for the rebuilding of the company's wharf in front of their depot grounds . . . with such mooring posts, cluster-piles for fenders every twenty feet, rows of piles, etc., as the company through their engineer may require, for the sum of $40 per square of one hundred square feet . . . The old wharf to be made as good as new, and the new wharf in the best workmanlike manner . . . It is also understood and agreed that the said G. W. Bayley, division engineer of the company, shall supervise and direct the work hereby agreed to be done, and that the said work shall be done to his satisfaction."

In accordance with this contract, Carvin proceeded to make extensive alterations in the wharf. During the progress of this work, Hanning went upon the wharf, presumably for the purpose of some business with the company, though it did not appear why he was there. At one place on the wharf Carvin's workmen had taken up the floor and had laid down some planks which were not made fast. Hanning stepped upon a loose

plank, was thrown down a distance of ten feet, and was seriously injured. He brought this action against the railroad company, alleging that his injury was due to the negligent manner in which the work on the wharf had been performed, the underlying theory, of course, being that the company was bound to keep the wharf in a safe condition for persons lawfully coming thereto. The defence was that the repair of the wharf had been committed by the company to Carvin, that Carvin was an independent contractor, and that, therefore, the company could not be held liable for any negligence of the contractor in performing his work.

Held, that, by the terms of the contract, the company retained such control over the work as made it responsible for the proper execution of the repairs, and that it was liable for the negligence whereby Hanning had been injured.

HUNT, J.: The company do not yield to Carvin the possession or control of the wharf. They may direct the number of mooring-posts, cluster-piles for fenders, rows of piles, slips and inclines, paying according to the number of square feet covered. They are at liberty to direct how much material shall be used, and how it shall be laid to make the old wharf as good as new, and to make the new of the best workmanship. They are to supervise the work to be done. They are to direct how it is to be done. This includes the power of controlling and managing the entire performance of the work within the general limits mentioned. It includes the possession of the wharf, the direction, management and control of all the details of the work. It makes Carvin their agent or servant, receiving a larger or smaller compensation as they may expand or contract his work.

The rule extracted from the cases is this: The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of. So long as he stands in the relation of principal or master to the wrongdoer, the owner is responsible for his acts. When he ceases to be such, and the actor is himself the principal and master, not a servant or agent, he alone is responsible. Difficult questions arise in the application of this rule. Nice shades of distinction exist, many of the cases are hard to be reconciled. Here the general management and control of the work was reserved to the company. Its extent in many particulars was not prescribed. How and in what manner the wharf was to be built was not pointed out. That rebuilt was to be as good as new. The new was to be of the best workmanship. This is quite indefinite, and authorizes not only, but requires, a great amount of care and direction on the part of the company. The submission of the whole work to the direction of the company's engineer is evidence, though not conclusive, that the

company retain the management and control. The reservation of authority is both comprehensive and minute. The company have the general control, and it may prescribe where each plank shall be laid, where each stringer shall be put down, where each nail shall be driven. All the details are to be completed under their order and according to their direction. The contractor undertakes in general terms to do the work well. The company reserve the power not only to direct what shall be done, but how it shall be done. This is an important test of liability.

Ellis vs. Sheffield Gas Co., 2 El. & Bl. 767. Queen's Bench (1853).

The Gas Company entered into a contract with the firm of Watson Brothers by which the latter undertook to open trenches in certain streets of Sheffield, so that the company might lay gas pipes therein, and afterwards to fill up the trenches and restore the surface of the streets to its original condition. Neither the company nor Watson Brothers had any authority to open the streets; and the work, as the court held, was in itself a public nuisance. In the execution of the contract, certain servants of Watson Brothers left some earth and stones so heaped as to obstruct a sidewalk; and Mrs. Ellis, passing along the street, fell over the obstruction and broke her arm.

Held, that the Gas Company was liable to Mrs. Ellis, notwithstanding the fact that the specific obstruction by which she was injured was due to the negligence of the contractors' servants; and, this, for the reason that the work contracted for was itself unlawful.

LORD CAMPBELL, C. J.: I am clearly of opinion that, if the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself. * * * In the present case the defendants had no right to break up the streets at all; they employed Watson Brothers to break up the streets, and in so doing to heap up earth and stones so as to be a public nuisance; and it was in consequence of this being done by their orders that the plaintiff sustained damage. It would be monstrous if the party causing another to do a thing were exempted from liability for the act, merely because there was a contract between him and the person immediately causing the act to be done.

Chicago vs. Robbins, 2 Black, 418; **Robbins vs. Chicago,** 4 Wall. 657. Supreme Court of the United States (1862 and 1866).

Robbins owned a lot in Chicago on which he undertook to erect a large building. One Button contracted to do the principal part of the construction, though six other contractors were concerned in various parts of the work. In the execution of his contract, Button made an excavation in the adjoining street, which excavation was to create a vault, eleven feet wide, under the sidewalk, and an area, five feet wide, next to the building and intended to be covered by a grating which should constitute the inner part of the side walk. Such opening of the street was in accordance with the municipal regulations, and the fact that Button had dug into the street was known to the municipal authorities. Button covered so much of the opening as was intended to be the vault, but the part which was to be the area was left uncovered, and was not marked by lights or otherwise guarded. The work being in this state, on a dark and stormy night, one Woodbury, passing the building, fell into the area and was seriously injured. He sued the city for the negligence of the municipal officers involved in suffering so dangerous a defect to exist in the sidewalk, and he recovered damages to the amount of $15,000. Robbins had been informed by the city attorney of the Woodbury suit, though no formal notice of that fact had been given him nor had the city expressly required him to assume the defence. The city, having paid Woodbury, brought this action against Robbins to recover the amount of the judgment. The principal defence of Robbins was that the default was that of Button, who was an independent contractor, and had by his contract engaged to be responsible for any accidents which might result from his negligence. The case was twice tried, the first trial resulting in a judgment in favor of Robbins. This judgment was reversed in 2 Black, 418, where Mr. Melville W. Fuller appeared for Robbins. At the next trial the city obtained a judgment, which was affirmed in 4 Wall. 657. In both opinions, Robbins was held liable. The extracts following, one from the opinion by Davis, J., in

the earlier report, and the other from the opinion of Clifford, J., in the later volume, indicate the principles which were applied to the case.

DAVIS, J.: This area, when it was begun, was a lawful work, and, if properly cared for, it would always have been lawful; but it was suffered to remain uncovered, and thereby became a nuisance, and the owner of the lot for whose benefit it is made is responsible. He cannot escape liability for letting work out like this to a contractor, and shift responsibility on to him if an accident occurs. He can not even refrain from directing his contractor in the execution of the work so as to avoid making the nuisance. A hole can not be dug in the sidewalk of a large city, and left without guards and lights at night, without great danger to life and limb; and he who orders it dug, and makes no provision for its safety is chargeable if injury is suffered. It is said that Robbins did not reserve control over the mode and manner of doing the work, and is therefore not liable; but the digging this area necessarily resulted in a nuisance—[that] was the result of the work itself—unless due care was taken to make the area safe.

CLIFFORD, J.: Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the injury results *directly* from the acts which the contractor agrees or is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party.

District of Columbia vs. Blackman, 32 App. D. C. 32 (1908).

Bogley and Brothers, having two houses in course of construction, obtained from the proper municipal officer a permit by which Lockhead, a registered plumber, was authorized to open the sidewalk in front of the houses for the purpose of connecting a drain-pipe with the sewer in the street. Among the conditions upon which the permit was granted, it was stipulated that the opening should be suitably guarded during the daytime. The cut was completed about eleven o'clock in one morning; and, because the piping was not then at hand, the workmen departed, leaving one laborer to guard the trench until the material should arrive. This laborer, having occasion to absent himself about three o'clock in the afternoon, had left the place unguarded for fifteen or twenty minutes, when Blackman, passing by and pausing to look at the houses, fell into the trench. Blackman sued the Messrs. Bogley, the plumber, and the District of Columbia, and obtained a judgment against all the defendants. Lockhead did not appeal, but the other defendants did. The judgment was affirmed against the Messrs. Bogley, the court holding them liable upon the authority of Robbins vs. Chicago, 4 Wall. 678, and Cleveland vs. King, 132 U. S. 295. The District of Columbia was held

not liable for the accident on the ground that the excavation had not remained unguarded for a sufficient length of time to charge the municipal authorities with notice of the dangerous condition.

Philadelphia, Baltimore and Washington Railroad Company vs. Karr, 38 App. D. C. 193.

Karr owned some houses fronting upon First street, N. E., in Washington. The railroad company was authorized by an Act of Congress to construct a tunnel under First street, and that company employed another corporation, the Continental Jewell Filtration Company, to do the construction. The tunnel, as it was built, ran close to the building line of First street and forty-two feet below the surface. In consequence of the unskillful or incautious manner in which the work was done, the foundations of Karr's houses settled; and, for the damage done to his property, he brought this action against the railroad company.

Held, that the defendant was responsible for the damage sustained by the plaintiff, notwithstanding the employment of an independent contractor.

VAN ORSDEL, J.: Unquestionably the Filtration Company occupied the relation of an independent contractor within the rule. But this by no means operates to relieve the defendant from liability. It was intimated, without expression of opinion, in the case of Casement vs. Brown, 148 U. S. 615, where the suit was against the contractor and the contract was in terms the same as the one before us, that the action might have been maintained against the principal, if the injured party had so elected to bring his suit. The liability of the principal is in each case dependent, not upon the question whether or not the tort is committed by an independent contractor, but upon whether the circumstances of the case are such as to prohibit the principal from contracting away his liability. In this instance, defendant acquired a right from Congress to construct the tunnel. The grant to defendant was a personal one. Congress, as guardian of the rights of the public in the use of the highway, either on the surface or under the surface, did not intend to grant to defendant the right to so construct its tunnel as to impair private rights without compensation. The franchise carried with it the liability, and the defendant, in accepting the privilege, accepted the liability which could no more be contracted away than could the franchise itself.

The construction of a railroad tunnel is highly dangerous to property above and adjacent to it. Defendant was charged with knowledge of this fact and it could not relieve itself from exercising due care to prevent the mischief under the rule of independent contractor, by employing someone else to do the work.

The rule laid down by the English courts is well expressed in Bower vs. Peate, L. R. 1 Q. B. Div. 321, as follows: "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbors must be expected to arise, unless means

are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good grounds for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise."

Hole vs. Sittingbourne and Sheerness Railway Company, 6 H. & N. 488. Exchequer (1861).

The railway company was authorized to build a line crossing the Swale, a navigable arm of the sea, with a provision that the Swale should be crossed by a draw-bridge capable of being so operated as not to delay a vessel in the stream for a longer period than ten minutes. The company contracted with one Withers for the construction of such a bridge, and Withers built a draw-bridge, which, however, had not been accepted or used by the company when the cause of action now to be stated arose.

The plaintiff operated a tannery on the bank of the Swale above the site of the company's bridge. He chartered two vessels to bring bark from Antwerp to his works. When the vessels arrived in the Swale, the bridge was closed, and the engineer in charge stated that it could be not opened for a week or two, the machinery being out of order. The plaintiff, in order to avoid paying demurrage for the vessels, was obliged to transfer their cargoes to barges and thus carry the bark to his tannery. In an action brought by him against the company, it was contended on behalf of the defendant that the contractor, and not the company, was liable for the defect in the bridge. *Held,* that, as the company was bound by law to pro-

vide a bridge that could be operated, this obligation could not be evaded by contracting with another person to do that for which the company was responsible.

POLLOCK, C. B.: The short ground on which my judgment proceeds is that this does not fall within that class of cases where the principal is exempt from responsibility because he is not the master of the person whose negligence or improper conduct has caused the mischief. * * * Where the act complained of is purely collateral, and arises incidentally in the course of the performance of the work, the employer is not liable, because he never authorized that act—the remedy is against the person who did it. That, however, generally affords but a poor compensation to the person injured; for the wrongdoer is usually a common workman. Then comes the inquiry, who is the master? The contractor. In such cases the employer is not responsible.

But when the contractor is employed to do a particular act, the doing of which produces the particular mischief, another doctrine applies. Here the legislature empowered the company to build the bridge; in building that bridge the contractor created an obstruction to the navigation, and for that the company is liable. I suggested in the course of the argument that, where a man employs a contractor to build a house, who builds it so as to darken another person's windows, the remedy is not against the contractor, but the owner of the house. It may be that the same principle applies to cases where a man is employed by another to do an act which it is the duty of the latter to do. * * * So here it was the duty of the company to see how the contractor was about to construct the bridge. They ought to have taken care to ascertain what he was about to do—what materials he should use, and to have seen that the specification and the materials were such as would insure the construction of a proper and efficient bridge. But I do not rest my judgment on that ground, but simply on this, that there is a distinction between mischief which is collateral and that which directly results from the act which the contractor agreed and was authorized to do.

WILDE, B.: The distinction appears to me to be, that, when work is being done under a contract, if an accident happens, and an injury is caused by negligence collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief, and the injury can only be said to arise from the authority of the employer, because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorized the act, and is responsible for it. * * * It [the present case] is not distinguishable from the case where a landowner orders a person to erect a building upon his land which causes a nuisance. The person who ordered the structure put up is liable; and it is no answer for him to say that he ordered it to be put up in a different form.

Liability to Servant.

Priestley vs. Fowler, 3 M. & W. 1. Exchequer (1837).

The defendant was a butcher and the plaintiff was employed by him in that trade. The plaintiff was directed to take certain of the defendant's goods to certain places in a van belonging to the defendant, which was driven by another servant of his. It was not alleged that Fowler knew that the van was out of repair or overloaded; but the declaration, after stating that Priestley had gone out upon the wagon in pursuance of the order given him, averred that thereupon "it became the duty of the defendant, on that occasion, to use due and proper care that the said van should be in a proper state of repair, that it should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless, the defendant did not use proper care that the van should be in a sufficient state of repair, or that it should not be overloaded, or that the plaintiff should be safely and securely carried thereby; in consequence of the neglect of all and each of which duties the van gave way and broke down, and the plaintiff was thrown with violence to the ground, and his thigh was thereby fractured, etc."

At the trial the plaintiff gave evidence showing that the collapse of the van was due to overloading, and that it had been so loaded with the defendant's knowledge, and the verdict was for the plaintiff. The defendant moved in arrest of judgment, on the ground that the case, as stated in the declaration, did not entitle the plaintiff to recover. There being in the declaration no averment that the defendant knew of any defects in the van or in the mode of loading, and the court being of opinion that the relation of master and servant did not, of itself, oblige the defendant to insure the safety of the plaintiff in the discharge of his duties, judgment was arrested.

Lord Abinger, C. B.: It has been objected to this declaration that it contains no premises from which the duty of the defendant, as therein alleged, can be inferred in law; or, in other words, that from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damages to the servant arising from any vice or imperfection, unknown to the master,

in the carriage or in the mode of loading and conducting it. For, as the declaration contains no charge that the defendant knew any of the defects mentioned, the court is not called upon to decide how far such knowledge on his part of a defect unknown to the servant, would make him liable.

It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other.

If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for the negligence of all his inferior agents. If the owner of a carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins.

The inconvenience, not to say the absurdity, of these consequences, affords a sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the cause of his employment, to the best of his judgment, information and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise

on behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.

Butler vs. Frazee, 25 App. D. C. 392. Affirmed 211 U. S. 459 (1908).

The plaintiff, a young woman of twenty-two, had been for two years employed in the operation of mangles in laundries, and was so employed in the laundry of the defendant when the accident occurred on account of which this suit was brought. The mangle consisted of a large cylinder, about four feet in diameter, which was in contact with five rollers above; and when the machine was in motion the cylinder and the rollers revolved inwardly, thereby ironing articles which were placed between them and drawn in by the revolution. In front of the revolving parts was a large flat board, upon which were spread the articles to be ironed; and the plaintiff's duty was, with the aid of another operator who stood at her side, to smooth out such articles on the board and, by pressure of her fingers, to guide those articles to the inner edge of the board, where they were taken in by the revolving cylinder and rollers. In front of the cylinder, and about four inches therefrom, was a finger-guard, a bar of iron three inches wide and one-eight of an inch thick, which extended across the board. This guard, which was painted red, was adjustable, and could be fixed at a height of from one-fourth of an inch to four inches above the board, the elevation being determined by the thickness of the articles to be fed into the machine. The whole apparatus and its structure were plainly visible.

While the plaintiff was guiding a table-cloth into the revolving mechanism, her hand was drawn under the guardrail and between the cylinder and the roller, and was so injured that amputation became necessary. From the circumstances of the accident it might be inferred that her hand had become entangled by a folding back of the cloth at one side, the other side of the cloth having gone under the rail and been engaged by the

cylinder. There was some evidence tending to show that the feed board had become loosened so as to leave a space between the cylinder and the inner edge of the board; but, as it was clear that this defect could not have caused or contributed to the injury sustained by the plaintiff, no point with reference to this fact was made in the argument. The ground upon which the plaintiff relied is stated in the extract from the opinion of the Supreme Court copied below. The trial court directed a verdict, and rendered a judgment, in favor of the defendant, and this judgment was affirmed by the Court of Appeals of the District of Columbia and by the Supreme Court of the United States.

MOODY, J.: The single ground upon which the plaintiff's right to recover was rested was that the guard-rail was adjusted at an excessive height, so that it would permit the plaintiff's hand to be drawn between it and the feed-board up to the point of engagement between the revolving cylinder and rollers. The judgment of the court below went against the plaintiff, upon the theory that she assumed the risk of this danger, and that is the question to be considered.

One who understands and appreciates the permanent conditions of machinery, premises and the like, and the danger which arises therefrom, or by the reasonable use of his senses, having in view his age, intelligence and experience, ought to have understood and appreciated them, and voluntarily undertakes to work under those conditions and to expose himself to those dangers, cannot recover against his employer for the resulting injuries. Upon that state of facts the law declares that he assumes the risk. The rule is too well settled to warrant an extensive discussion of it or to analyze the different reasons upon which it has been held to be justified. The rule of assumption of risk has been thought by many to be a hard one when applied to the complicated conditions of modern industry, so largely conducted by the aid of machinery propelled by irresistible and merciless mechanical power; and the criticism frequently has been made that the imperative need of employment leaves to the workman no real freedom of choice, such as the rule assumes. That these considerations have had an influence is shown by the notorious unwillingness of juries to apply the rule, and by the legislative modifications of it which, from time to time, have been made, as, for instance, by Congress in the Safety Appliance Law. Schlemmer vs. Buffalo, Rochester, &c., Rwy. Co., 205 U. S. 1. But the common law in this regard has not been modified in the District of Columbia, and we have no other duty than to enforce it. No question has been made in the case at bar that the rule prevails and is relevant to the facts of the case.

The contention, however, is that, as the plaintiff testified in substance that she did not know and appreciate the danger which she was encountering; that testimony, with the other facts in the case, raised an issue for the jury, and that it could not be said, as matter of law, that the risk had been assumed. This contention is sustained by a well considered case: Stager vs. Troy Laundry Co., 38 Oregon, 480. See also Fronk vs. Evans Steam City Laundry Co., 70 Nebraska, 75.

Where the elements and combination out of which the danger arises are visible, it cannot always be said that the danger itself is so apparent that the employé must be held, as matter of law, to understand, appreciate and assume the risk of it. Texas & Pacific Ry. Co. vs. Swearingen, 196 U. S. 51; Fitzgerald vs. Connecticut River Paper Co., 155 Massachusetts, 155. The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury. But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employé is of full age, intelligence and adequate experience, and all these elements of the problem appear without contradiction from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly. Patton vs. Texas & Pacific Rwy. Co. 179 U. S. 658, and cases there cited. The case at bar falls within this class.

The plaintiff was a person of mature years, intelligent and of adequate experience. She had worked for some months upon this particular machine, and during that time it was always in exactly the same condition in which it was on the day of the injury. The elements out of which the danger arose were plainly visible to her. The employer had no duty, statutory or otherwise, to use a rail to guard against so obvious a danger as that arising out of two cylinders in contact with each other and seen to be revolving inwardly. Hickey vs. Taafe, 105 N. Y. 26. We see nothing in the manner of the adjustment of the guard rail which constituted an allurement or was calculated to blind the plaintiff to the danger. The adjustment of the parts of the machine was continually before her eyes. The danger of being drawn between the cylinder and the rollers by contact was illustrated to her every minute of the day by the drawing in of the clothes to be ironed by contact with the revolving cylinder. The distance between the guard-rail and the feedboard was constant, and its relation to the thickness of her hand was apparent. She must have understood that, if her hand became inextricably entangled with the clothes, as seems from the rather vague testimony of the plaintiff was the case here, it would be drawn between the cylinder and receive the injuries which unhappily occurred. We think that it must be said, as matter of law, that she voluntarily assumed the risk of the danger. Tuttle vs. Milwaukee Railway, 122

U. S. 189; Crowley vs. Pacific Mills, 148 Massachusetts, 228; Gleason vs. Railroad, 159 Massachusetts, 68; Connolly vs. Eldredge, 160 Massachusetts, 566; Lemoine vs. Aldrich, 177 Massachusetts, 89; Burke vs. Davis, 191 Massachusetts, 20

Armour vs. Hahn, 111 U. S. 313. Supreme Court of the United States (1884).

Armour was building a large packing-house on which Hahn was employed as a carpenter. The latter, in the course of his duties, and in executing an order of his foreman, stepped upon a projecting beam which he assumed to have been made fast. The timber had not been secured, but gave way with Hahn, whereby he was thrown to the ground and injured. He brought this action against Armour, contending that it had been the duty of the defendant, as employer, to provide a safe place for the work and to keep the place safe.

Held, that the defendant was not liable, his duty to provide a safe place to work not obliging him to keep the place constantly safe without regard to those changes in conditions or to the negligence of fellow-servants which were incident to the progress of the work.

GRAY, J.: The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building which they are erecting in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows. * * * The projecting timber upon which the plaintiff placed his foot was inserted in a wall which was in the course of being built, and which at the time had been bricked up only so far as to be on a level with the upper surface of the timber. The usual course, as the plaintiff himself testified, was to put the timber in, and leave it in that way temporarily, and afterwards build the wall up over it. It is not pretended that the stick of timber was in itself unsound or unsuitable for its purpose. If it was at the time insecure, it was either by reason of the risks ordinarily incident to the state of things in the unfinished condition of the building; or else by reason of some negligence of some of the carpenters or bricklayers, all of whom were employed and paid by the same master, and were working in the course of their employment at the same time and place, with an immediate common object, the erection of the building, and therefore, within the strictest limits of the rule of law upon the subject, fellow-servants, one of whom cannot maintain an action for injuries caused by the negligence of another against their common master. Hough vs. Railway Co., 100 U. S. 213; Randall vs. Baltimore & Ohio Railroad, 109 U. S. 478.

Northern Pacific Railroad Company vs. Herbert, 116 U. S. 642. Supreme Court of the United States (1886).

Herbert, a brakeman in the employ of the railroad company, was injured in the discharge of his duty by reason of the fact that a brake, which he was ordered to set, was in a defective and dangerous condition. The repair of the brake was a duty which the company had entrusted to others of its employees. The defence, therefore, was that the injuries sustained by Herbert were due to the negligence of a fellow servant. But it was held that the duty of furnishing safe appliances was one incumbent upon the master, and that the company was liable for the negligence committed in giving Herbert an unsafe brake.

FIELD, J.: The general doctrine as to the exemption of an employer from liability for injuries to a servant, caused by the negligence of a fellow-servant in a common employment, is well settled. When several persons are thus employed there is necessarily incident to the service of each the risk that the others may fail in that care and vigilance which are essential to his safety. In undertaking the service he assumes that risk, and, if he should suffer, he cannot recover from his employer. He is supposed to have taken it into consideration when he arranged for his compensation. As we said on a former occasion: "He cannot in reason complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid." Chicago & Milwaukee Railroad Co. vs. Ross, 112 U. S. 377, 383.

It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe materials, machinery, or other means, by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient and skillful co-laborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by courts of the highest character, that it can hardly be considered as any longer open to serious question. It was substantially declared in the recent case of Hough vs. Railway Co., 100 U. S. 213, 218, where we said that, notwithstanding a railroad corporation may be controlled by competent, watchful and prudent directors, and care and caution are exercised in the selection of subordinates at the head of the several branches of its service, its obligation still remains

to provide and maintain in a suitable condition the machinery and apparatus to be used by its employés; and that it "cannot, in respect of such matters, interpose between it and the servant, who has been injured without fault on his part, the personal resonsibility of an agent, who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation." In that case the engine of the railroad, coming in contact with an animal, was thrown from the track over an embankment, whereby the whistle fastened to the boiler was forced out, thus permitting hot water and steam to escape, which so scalded the engineer as to cause his death. The engine was thrown from the track because the cow-catcher or pilot was defective; and the whistle was forced out because it was insecurely fastened. These defects were owing to the negligence of the company's master-mechanic and the foreman of the round-house, to whom was committed the exclusive management of the motive power of the company, with control over all the engineers employed. In an action by the widow and child of the deceased the company set up as a defense that, if the alleged defects existed, which it denied, they were owing to the negligence of those servants, for which the company was not liable. The court held that the company was not thereby exonerated from liability.

Wonder vs. Baltimore and Ohio Railroad Company, 32 Md. 411 (1870).

Wonder, a brakeman employed on a train of the defendant company, in attempting to set a brake, was thrown from the train and sustained personal injuries, for which he brought this suit. He claimed that the company was liable for the accident, on the grounds

1st. That the brake was fitted with a hook, being of the style which had long been in use upon the company's cars, whereas it should have been fitted with an eye-bolt, a somewhat recent and improved form of arrangement, which would have made the accident impossible or unlikely; and,

2nd. That, through the negligence of the company's servants in the repair shop, the brake had been defectively fixed upon the car, the defect consisting in turning the point of the hook in the wrong direction, whereby the accident had been rendered possible.

Held, that the company, having adopted reasonably safe appliances, and the brake in use seeming to be within that description, the defendant was not bound to replace them with new equipment merely because improved and safer appliances had been invented; and that the persons employed in the repair of the car were fellow-servants of the plaintiff, for the consequences of whose negligence the company was not liable to the plaintiff.

ALVEY, J. * * * The servant is a free agent to select the employment into which he enters, and in contracting for the wages that he is to receive, must be supposed to take into account the risks to which the

employment may expose him; and among those risks are the defects and accidents of the machinery, and the negligence and want of caution of fellow-servants in the common employment. * * * All that can be required of the master, and for the neglect of which he is responsible to the servant, is, that he shall use due and reasonable diligence in providing safe and sound machinery, and in the selection of fellow-servants of competent skill and prudence, so as to make it reasonably probable that injury will not occur in the exercise of the employment. * * * Who is a fellow-servant, within the meaning of the rule, has been a question of some diversity of decisions, though the decided weight of authority is to the effect that all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it, are fellow-servants, each taking the risk of the other's negligence. * * * It follows, therefore, that the brakeman on the train is in the same common employment with the mechanics in the shops to repair and keep in order the machinery, and with the inspector of the machinery and rolling stock of the road, and the superintendent of the movement of trains. Farwell vs. R. R., 4 Met. 49. * * * If, therefore, the defect in the brake that caused the injury in the present instance existed by reason of the neglect or want of care on the part of employees of the defendant, the latter cannot be held liable, unless there has been negligence in the selection of those servants, and the *onus* of proof of such negligence is on the plaintiff. * * * In the case before us, the question, depending upon a diversity of opinion, as to whether the eye-bolt or the hook is the better mode of fastening the brake, is immaterial, as both seem to be approved appliances, tested by trial and experience; and if it were conceded that the eye-bolt has superior merits, it by no means follows that the defendant was bound to discard the hook that had been used for a long time, and on so many of its cars, without accident. A master is not bound to change his machinery, in order to apply each new invention. If the servant thinks proper to operate such machine it is at his own risk, and all that he can require is that he shall not be deceived as to the degree of danger.

National Enamelling Company vs. Cornell, 95 Md. 524 (1902).

Cornell was employed in the defendant company's factory to operate a power press used for making edges upon pans. A part of the press was a die or disc, which moved up and down, and which was, by means of other machinery, caused to stamp forcibly upon the surface of a lower and stationary disc. While the plaintiff was engaged in working the press, the single nut by which the moving disc was held in its place became loose, and the disc fell upon the plaintiff. He sued the company for the injuries sustained by him, contending that the machine was unsafe and unfit for use in that two nuts, instead of one, were requisite to make such a disc secure, and that the company was guilty of negligence in not maintaining the machine in a sound condition.

Held, that, in Maryland, the master's duty to maintain machinery in repair is ordinarily discharged by the employment of competent servants to make repairs, and the negligence of such servant is one of the risks which their fellow-servants assume.

BOYD, J.: The tendency of many courts of this country has been to require the master to use the same care in maintaining and keeping in repair the machinery, as in furnishing it, and it cannot be denied that in same of the later cases in this state the general doctrine has been stated in terms apparently more liberal to the servant than in Wonder's case, 32 Md. 411. * * * The difference is that in Maryland and some other states, the master's duty *to maintain* is ordinarily considered discharged by the employment of competent employees to make the repairs, and by furnishing proper facilities for them, and he is not usually responsible to an employee for the negligence of a fellow-servant entrusted with the duty of making repairs—the negligence in that respect being one of the risks assumed by the servant when he enters the service of the master; while in many other states the employee, whose duty it is to repair, stands in the place of and represents the master, and the latter is held responsible for the fellow-servant's failure to repair.

Manufacturing Co. vs. Jamar, 93 Md. 404 (1901).

The defendant, a shoe manufacturing company, contracted with the directors of a penitentiary for the use of some buildings within the prison grounds, to be used as a factory, and for the labor of a number of convicts. With the consent of the authorities, the company built within the prison a freight elevator for use in the company's business. The convicts assigned to the company were selected by the warden and remained under the control and in the custody of the prison guards, even while at work. The plaintiff was one of the convicts so assigned, and was detailed to run the elevator. Owing to an accident, caused by the negligence of a fellow-servant, the elevator fell, and, as the safety appliances failed to work, Jamar was seriously injured. He brought this action. It was contended by the company that, as the relation of master and servant did not exist between hired convict labor and the employer, owing to the fact that the labor was involuntary servitude and that the contractor's control of the convict was limited, they were not liable to the plaintiff for injuries sustained by him while in the service stated.

Held, that, though the relation of master and servant did not exist, to its full extent, the contractor was liable to the same extent as a master in respect of those incidents of the employment over which he had control. The plaintiff was allowed to recover.

Hough vs. Texas and Pacific Railway Company, 100 U. S. 213. Supreme Court of the United States (1879).

Hough, an engineer in the employment of the defendant company, discovered that the pilot on the locomotive of which he

was in charge had become loose and was a source of danger. This fact he reported to the master-mechanic and the foreman of the roundhouse, who were the persons appointed by the company to repair the machinery used in the operation of the road, and the former of whom had the exclusive management of the company's motive power, with full control over the engineers and authority to employ and discharge them in his discretion. The defective condition of the pilot was due to negligence on the part of both of these officials, and they assured Hough that the pilot should be repaired or replaced by a new one. This, however, was not done, and Hough continued, for a period of time not definitely shown by the report, to use the engine in its defective condition and with knowledge that it was so. At length the locomotive came into collision with an animal on the track, and was, by reason of the loose pilot, thrown over an embankment.

It happened that the whistle on the engine also was insecurely fastened, a fact of which Hough seems to have been ignorant. In the overturning of the engine, the whistle was loosed from its attachment, whereby steam was allowed to escape from the boiler, and this escaping steam so seriously scalded Hough that he died from the injuries thereby caused.

This action was brought by Hough's widow and child to recover damages for his death, which was imputed to the negligence of the company's servants in failing to repair the pilot and in allowing the whistle to become and remain defective. The defence was two-fold:

1st. That the employees of the company who had been negligent, if there was negligence, were fellow-servants of Hough; and,

2nd. That Hough had, himself, been guilty of contributory negligence in using the engine with the knowledge that it was, in one respect at least, defective and dangerous.

The Supreme Court, reversing the judgment of the trial court, held,

1st. That the negligent officials were not fellow-servants of Hough, within the sense and scope of the rule on that subject, but were representatives of the master in the discharge of duty

personal to the master, and that for their negligence in the discharge of that duty the company was liable; and,

2nd. That Hough, in using the engine when he knew it to be defective, but after he had been promised that it should be repaired, was not necessarily guilty of contributory negligence; but that it was a question of fact for the jury, whether, in relying upon the promises made to him and continuing to use the engine, he had exercised due care and prudence, or had acted as only a reckless man, utterly careless of his safety, would act.

HARLAN, J.: The principal question arising upon the assignments of error requires the consideration, in some of its aspects, of the general rule exempting the common master from liability to one servant for injuries caused by the negligence of a fellow-servant in the same employment. "The general rule," said C. J. SHAW, in Farwell vs. Boston & Worcester Railway Corporation, 4 Metc. (Mass.) 49, "resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal contemplation the compensation is adjusted accordingly. And we are not aware of any principle which should except the perils arising from the carelessness and negligence of those in the same employment. These are perils which the servant is as likely to know, and against which he can as effectively guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any other."

To prevent misapprehension as to the scope of the decision, he deemed it necessary, in a subsequent portion of his opinion, to add: "We are far from intending to say that there are no implied warranties and undertakings arising out of the relation of master and servant. Whether, for instance, the employer would be responsible to an engineer for the loss arising from a defective or ill-constructed steam-engine; whether this would depend upon an implied warranty of its goodness and sufficiency, or upon the fact of willful misconduct or gross negligence on the part of the employer, if a natural person, or of the superintendent or immediate representative and managing agent, in case of an incorporated,—are questions on which we give no opinion." * * *

It is sufficient to say that, while the general doctrine, as stated by CHIEF JUSTICE SHAW, is sustained by elementary writers of high authority, and by numerous adjudications of the American and English courts, there are well-defined exceptions, which, resting as they clearly do upon principles of justice, expediency, and public policy, have become too firmly established in our jurisprudence to be now disregarded or shaken.

One, perhaps the most important, of those arises from the obligation of the master, whether a natural person or a corporate body, not to expose the servant, when conducting the master's business, to perils or hazards against which he may be guarded by proper diligence upon the part of the master. To that end the master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter. It is implied in the contract between the parties that the servant risks the dangers which ordinarily attend or are incident to the business in which he voluntarily engages for compensation; among which is the carelessness of those, at least in the same work or employment, with whose habits, conduct, and capacity he has, in the course of his duties, an opportuinty to become acquainted, and against whose neglect or incompetency he may himself take such precautions as his inclination or judgment may suggest. But it is equally implied in the same contract that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk, for the obvious reason that the servant who is to use the instrumentalities provided by the master has, ordinarily, no connection with their purchase in the first instance, or with their preservation or maintenance in suitable condition after they have been supplied by the master. * * * A railroad corporation may be controlled by competent, watchful, and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business, in all its departments, are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain, in suitable condition, the machinery and apparatus to be used by its employés,—an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the dangers which may be encountered. Those, at least, in the organization of the corporation, who are invested with controlling or superior authority in that regard represent its legal personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant, who has been injured, without fault on his part, the personal responsibility of an agent who, in exercising the master's authority, has violated the duty he owes, as well to the servant as to the corporation.

To guard against the misapplication of these principles, we should say that the corporation is not to be held as guaranteeing or warranting the absolute safety, under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of employés. Its duty in that respect to its employés is discharged when, but only when, its agents whose business it is to

supply such instrumentalities exercise due care as well in their purchase originally, as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employés. * * *

One other question arising upon the instructions, and which has been discussed with some fullness by counsel, deserves notice at our hands. It is contended by counsel that the engineer was guilty of such contributory negligence as to prevent the plaintiffs from recovering. The instruction upon that branch of the case was misleading and erroneous.

The defect in the engine of which the engineer had knowledge was that which existed in the cow-catcher or pilot. It is not claimed that he was aware of the insufficient fastening of the whistle, or that the defect, if any, in that respect was of such a character that he should have become advised of it while using the engine on the road. But he did have knowledge of the defective condition of the cow-catcher or pilot, and had complained thereof to both the master-mechanic and the foreman of the round-house. They promised that it should be promptly remedied, and it may be that he continued to use the engine in the belief that the defect would be removed. The court below seem to attach no consquence to the complaint made by the engineer, followed as it was by explicit assurances that the defect should be remedied. According to the instructions, if the engineer used the engine with knowledge of the defect, the jury should find for the company, although he may have been justified in relying upon those assurances.

If the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held in that case to have himself risked the dangers which might result from the use of the engine in such defective condition. But "there can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept": Shearman & Redf. Negligence, section 96. * * *

"If the servant," says Mr. Cooley, in his work on Torts, 559, "having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant by continuing the employment engages to assume the risks" * * * . We may add, that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without its being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer

was not wanting in due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect, was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part.

Fellow-Servants.

Chicago, Milwaukee and St. Paul Railway Company vs. Ross, 112 U. S. 377. Supreme Court of the United States (1884).

Ross was the engineer of a freight train operated by the company and running out of Minneapolis. The conductor of that train was ordered by telegraph to stop at South Minneapolis until a gravel train coming up the line and running wild should arrive at that station. The conductor of the gravel train was ordered to run to South Minneapolis without regard to the freight train. The conductor of the freight was required by the rules of the company to show his orders to the engineer, and the train was not to leave the station where an order was received until both conductor and engineer understood it and agreed as to its meaning. On this occasion the conductor of the freight did not show, or mention, his order to the engineer, but went to sleep. The engineer passed South Minneapolis at the usual speed and, some distance beyond that station, met the gravel train, which he did not see until it was too late to prevent a collision, whereby Ross was injured.

In this action the defence of the company was that Ross and the conductor were fellow-servants. It was held—four justices dissenting—that the conductor, in virtue of his superior position and his authority over the engineer, was not a fellow-servant with the latter, but a vice-principal, who so stood in the place of the company that it was answerable to those subordinate to him for his negligence.

This case was, in the Conroy Case, *infra*, held to have been in effect overruled by later decisions.

FIELD, J.: There is, in our judgment, a clear distinction to be made in their relation to their common principal, between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the con-

trol and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles at great distance apart, each being under the control and direction of a conductor specially appointed for its management. We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow-servant with the firemen, the brakemen, the porters and the engineer. The latter are fellow-servants in the running of the train under his direction; as to them and the train, he stands in the place of and represents the corporation.

New England Railroad Company vs. Conroy, 175 U. S. 323. Supreme Court of the United States (1899).

A freight train of the railroad company broke in two, leaving one car attached to the locomotive. Discovering the fact, the engineer ran the locomotive ahead for about three miles, whistling for brakes. Then, supposing that his signals had been heard and observed, and the rear cars stopped, he slowed down, intending to go back and re-establish the proper connection. At the time of the break the conductor and two brakemen were in a caboose at the end of the train, and they did not hear the whistle, or know that the train had broken, or do anything to stop the detached cars. The rear portion of the train, being upon a descending grade, ran rapidly forward, and at length struck the car which was still connected with the engine. A brakeman who was upon this car was by the collision thrown off and killed. His administrator, Conroy, brought this action

for the death so caused, relying upon the negligence of the conductor in managing the train, and particularly in not observing the break and in permitting the brakemen to remain in the caboose and away from the brakes.

Assuming, as seemed to be correct, that the fatality was due to the negligence of the conductor, the question was whether he and the deceased brakeman were fellow-servants within the rule on that subject. The holding was that the two trainmen were fellow-servants and the company was not liable for the death of the brakeman. The opinion reviews the principal cases, both in the State Courts and in the Supreme Court of the United States, and declares that the holding in Railroad Company vs. Ross, 112 U. S. 377, was in effect overruled in Railroad Company vs. Baugh, 149 U. S. 368, and other later cases in the same court.

SHIRAS, J.: There is a general rule of law, established by a great preponderance of judicial authority in the English and in the State and Federal courts, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment. But there have been conflicting views expressed in the application of this rule in cases where the employer is a railroad company, or other large organization, employing a number of servants engaged in distinct and separate departments of service; and our present inquiry is whether the relation between the conductor and the brakeman of a freight train is that of fellow servants, within the rule, or whether the conductor is to be deemed a vice principal, representing the railroad company in such a sense that his negligence is that of the company, the common employer.

Unless we are constrained to accept and follow the decision of this court in the case of Chicago, Milwaukee & St. Paul Railway Co. vs. Ross, 112 U. S. 377, we have no hesitation in holding, both upon principle and authority, that the employer is not liable for an injury to one employe occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough, to bring the case within the general rule of exemption, if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to accomplish the same general purposes, or, in other words, if the services of each in his particular sphere or department are directed to the accomplishment of the same general end; and that, accordingly, in the present case, upon the facts stated, the conductor and the injured brakemen are to be considered fellow-servants within the rule.

We shall refer to a few of the authorities which establish these principles. Farwell vs. Boston & Worcester Railroad, 4 Met. 49, is the leading case in Massachusetts. The question was thus stated by CHIEF JUSTICE SHAW:

"This is an action of new impression in our courts, and involves a principle of great importance. It presents a case, where two persons are in the service and employment of one company, whose business it is to construct and maintain a railroad, and to employ their trains of cars to carry persons and merchandise for hire. They are appointed and employed by the same company to perform separate duties and services, all tending to the accomplishment of one and the same purpose—that of the safe and rapid transmission of the trains; and they are paid for their respective services according to the nature of their respective duties, and the labor and skill required for their proper performance. The question is, whether, for damages sustained by one of the persons so employed, by means of the carelessness and negligence of another, the party injured has a remedy against the common employer."

After discussing the principles of law and reason applicable to the case, the Chief Justice proceeded:

"In applying these principles to the present case, it appears that the plaintiff was employed by the defendants as an engineer, at the rate of wages usually paid in that employment, being a higher rate than the plaintiff had before received as a machinist. It was a voluntary undertaking on his part, with a full knowledge of the risks incident to the employment, and the loss was sustained by means of an ordinary casualty, caused by the negligence of another servant of the company. Under these circumstances the loss must be deemed to be the result of a pure accident, like those to which all men, in all employments, and at all times, are more or less exposed; and, like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default; of which we give no opinion.

"It was strongly pressed in the argument, that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security; yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree control or influence the conduct of another. But we think this is founded upon a supposed distinction on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same and the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be to be in the same or different departments? In a blacksmith's shop persons

working in the same building at different fires may be quite independent of each other, though only a few feet distant. In a ropewalk several may be at work on the same piece of cordage, at the same time, at many hundred feet from each other and beyond the reach of sight and voice, and yet acting together.

"Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand toward him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied. The exemption of the master, therefore, from liability for the negligence of a fellow-servant does not depend exclusively upon the consideration, that the servant has better means to provide for his own safety, but upon other grounds. Hence the separation of the employment into different departments cannot create that liability, when it does not arise from express or implied contract, or from a responsibility created by law to third person and strangers, for the negligence of a servant. * * * The responsibility which one is under for the negligence of his servant, in the conduct of his business, toward third persons, is founded on another and distinct principle from that of implied contract, and stands on its own reasons of policy. The same reasons of policy, we think, limit this responsibility to the case of strangers, for whose security alone it is established. Like considerations of policy and general expediency forbid the extension of the principle, so far as to warrant a servant in maintaining an action against his employer for an indemnity which we think was not contemplated in the nature and terms of the employment, and which, if established, would not conduce to the general good." * * *

Without following further the history of this subject in the courts of the several States, we may state that, generally, the doctrine there upheld is that of the cases herein previously cited, except in the courts of the States of Ohio, Kentucky and perhaps others, in which the rule seems to obtain that, while the master is not liable to his servant for any injury committed by a servant of equal degree in the same sphere of employment, unless some negligence is fixed on the master personally, yet that he is liable for the gross negligence of a servant superior in rank to the person injured, and is also liable for the ordinary negligence of a servant not engaged in the same department of service.

Leaving the decisions of the state courts, and coming to those of this court, we find the latter to be in substantial harmony with the current of authority in the state and English courts. From this statement the case of Chicago, Milwaukee & St. Paul Railroad vs. Ross, 112 U. S. 377. must, perhaps, be excepted, and to it we shall revert after an examination of our other cases.

Randall vs. Baltimore & Ohio Railroad, 109 U. S. 478, was the case of an action in the Circuit Court of the United States for the District of West Virginia against a railroad corporation by a brakeman in its employ for personal injuries received, while working a switch, by being struck by one of its locomotive engines; and it was unanimously held by this court, affirming the court below, that the plaintiff could not recover, although the injury was occasioned by the negligence of the engineman in running his engine too fast, or not giving due notice of its approach. In the course of the opinion, which was pronounced by MR. JUSTICE GRAY, he said:

"The general rule of law is now firmly established that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment. This court has not hitherto had occasion to decide who are fellow-servants within the rule. . . . Nor is it necessary, for the purposes of this case, to undertake to lay down a precise and exhaustive definition of the general rule in this respect, or to weigh the conflicting views which have prevailed in the courts of the several States; because persons standing in such a relation to one another as did the plaintiff and the engineman of the other train are fellow-servants, according to the very great preponderance of judicial authority in this country, as well as the uniform course of decision in the House of Lords, and in the English and Irish courts, as is clearly shown by the cases cited in the margin. They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate common object—the moving of the trains."

Northern Pacific Railroad vs. Herbert, 116 U. S. 642, was a case wherein it appeared that a brakeman suffered an injury by reason of the fact that the brakes which he was called upon to apply were broken and out of order, and it was held, per MR JUSTICE FIELD, that it was the duty of the company to furnish sufficient and safe materials, machinery or other means by which service is to be performed, and to keep them in repair and order, and that as this duty had not been fulfilled the plaintiff was entitled to recover. There was another question in that case as to the import and effect of a statute of Dakota, in which Territory the accident took place, providing that "an employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé," and that "an employer must, in all cases, indemnify his employé for losses caused by the former's want of ordinary care."

It was held, by a majority of the court, that these provisions of the Dakota code expressed the general law that an employer is responsible for the injury to his employés caused by his own want of ordinary care; that his selection of defective machinery, which is to be moved by

steam power, is of itself evidence of a want of ordinary care, and allowing it to remain out of repair, when its condition is brought to his notice, or by proper inspection might be known, is culpable negligence; that the cars, in that case, had been defective for years; that the brakes were all worn out, and their condition had been called to the attention of the yard master, who had control of them while in the yard, and might have been ascertained, upon proper inspection, by the officer or agent of the company charged with the duty of keeping them in repair, yet nothing was done to repair either brakes or cars; that, in such circumstances, the company had not exercised ordinary care to keep the cars and brakes in good condition; and that, therefore, under the provisions of the statute, the company was bound to indemnify the plaintiff. The minority of the court considered that the case was governed by the local statute, and that the statute, properly construed, relieved the employer, under the facts of the case, from liability to the injured employé. They declined to express any opinion upon the question of liability apart from the statute.

Quebec Steamship Co. vs. Merchant, 133 U. S. 375, was an action brought in the Circuit Court of the United States for the Southern District of New York by one Merchant, who was employed as a stewardess of the steamship Bermuda, belonging to the defendant company. It appeared that the ship's company consisted of thirty-two persons, divided into three classes of servants, called three departments—the deck department, the engineers' department, and the steward's department. The captain, the first and second officers, the purser, the carpenter and the sailors were in the deck department; the engineers, the firemen and the stokers were in the engineers' department; the steward, the waiters, the cooks, the porter and the stewardess were in the steward's department. At the close of the evidence the defendant's counsel requested the court to charge the jury to find a verdict for the defendant on the ground that the injury sustained by the plaintiff was occasioned, if there was any negligence, by the negligence of a fellow-servant. This the court refused to do. There was a verdict for the plaintiff, and the case was brought to this court. Here it was contended that, as the carpenter whose negligence was alleged as the cause of the accident, was in the deck department, and the stewardess in the steward's department, those were different departments in such a sense that the carpenter was not a fellow-servant with the stewardess. But MR. JUSTICE BLATCHFORD, speaking for the entire court, said:

"The injuries to the plaintiff were caused solely by the negligence of one or the other of two fellow-servants who were in a common employment with her, and there was no violation or omission of duty on the part of the employer contributing to such injuries. Neither of her fellow-servants stood in such relation to her or to the work done by her, and in the course of which her injuries were sustained, as to make his negligence that of the employer. The case, therefore, falls within the well settled rule, as to which it is unnecessary to cite cases, which exempts an employer from liability for injuries to a servant by another servant, and does not fall within any exception to that rule which

destroys the exemption of the employer when his own negligence contributes to the injury, or when the other servant occupies such a relation to the injured party or to his employment, in the course of which her injury was received, as to make the negligence of such servant the negligence of the employer."

The next notable case is that of Baltimore & Ohio Railroad vs. Baugh, 149 U. S. 368, in which it was held that an engineer and fireman of a locomotive, running alone and without any train attached, were fellow-servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former. In the course of the opinion MR. JUSTICE BREWER said:

"It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow-servants and puts an end to the master's liability. On the contrary, all the cases proceed on the ground of some breach of positive duty resting upon the master, or upon the idea of superintendence or control of a department. It has ever been affirmed that the employé assumes the ordinary risks incident to the service; and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a co-worker. That the running of an engine by itself is not a separate branch of service seems perfectly clear. The fact is, all the locomotive engines of a railroad company are in the one department, the operating department; and those employed in running them, whether as engineers or firemen, are engaged in a common employment and are fellow-servants."

We shall have occasion to revert to this case when we come to consider the decision in Chicago, Milwaukee & St. Paul Railroad vs. Ross.

In Northern Pacific Railroad vs. Hambly, 154 U. S. 349, it was held that a common day laborer in the employ of a railroad company, who, while working for the company under the order and direction of a section boss or foreman, on a culvert on the line of the company's road, receives an injury by and through the negligence of the conductor and of the engineer in moving and operating a passenger train upon the company's road, is a fellow-servant with such engineer and such conductor, in such a sense as exempts the railroad company from liability for the injury so inflicted; and MR. JUSTICE BROWN, in delivering the opinion of the court, observed:

"To hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow-service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train, or two seamen on the same ship, are comparatively rare. In a large majority of cases there is some distinction either in respect to grade of service, or in the nature of the employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him

rather in the category of principal than of agent, as, for example, the superintendent of a factory or railway, and the employments were so far different that, although paid by the same master, the two servants were brought no further in contact with each other than as if they had been employed by different principals."

In Central Railroad Co. vs. Keegan, 160 U. S. 259, Baltimore & Ohio Railroad Co. vs. Baugh was approved and followed in respect to its statement as to what constitutes a vice-principal.

In Northern Pacific Railroad Co. vs. Peterson, 162 U. S. 346, an action had been brought in the Circuit Court of the United States for the District of Minnesota by Peterson to recover damages against the railroad company, alleged to have been caused by the negligence of the foreman of a gang of laborers, engaged in putting in repair sections of the railroad. The foreman had power to hire and discharge the hands who composed the gang, and had exclusive charge of their direction and management in all matters connected with their employment. The plaintiff recovered a verdict, and the judgment of the Circuit Court thereon was affirmed by the Circuit Court of Appeals of the Eighth Circuit. The cause was brought to this court, and the judgments of the courts below were reversed. The opinion of this court was by MR. JUSTICE PECKHAM, in which he reviewed the authorities, and expressed the following conclusions:

"The general rule is, that those entering into the service of a common master become thereby engaged in a common service and are fellow-servants, and, *prima facie*, the common master is not liable for the negligence of one of his servants which has resulted in an injury to a fellow-servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. He also owes the duty of providing reasonably safe tools, appliances and machinery for the accomplishment of the work necessary to be done. He must exercise proper diligence in the employment of reasonably safe and competent men to perform their respective duties, and it has been held in many States that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track If the master be neglectful in any of these matters it is a neglect of a duty which he personally owes to his employés, and if the employé suffer damage on account thereof, the master is liable. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow-servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such. * * * The rule is that, in order to form an exception to the general law of non-liability, the person whose neglect caused the injury must be one who was clothed with the control and management of a distinct department, and not a mere separate

piece of work in one of the branches of service in a department. This distinction is a plain one, and not subject to any great embarrassment in determining the fact in any particular case.

"When the business of the master or employer is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the individuals placed by the master in charge of these separate branches and departments of service, and given entire and absolute control therein, may properly be considered, with respect to employés under them, vice-principals and representatives of the master as fully and as completely as if the entire business of the master were placed by him under one superintendent. * * * This boss of a small gang of ten or fifteen men, engaged in making repairs upon the road wherever they might be necessary, over a distance of three sections, aiding and assisting the regular gang of workmen upon each section, as occasion demanded, was not such a superintendent of a separate department, nor was he in control of such a distinct branch of the work of the master, as would be necessary to render the master liable to a co-employé for his neglect. He was in fact, as well as in law, a fellow-workman; he went with the gang to the place of work in the morning, stayed there with them during the day, superintended their work, giving directions in regard to it, and returned home with them in the evening, acting as a part of the crew of the hand car upon which they rode. The mere fact, if it be a fact, that he did not actually handle a shovel or a pick, is an unimportant matter. Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss and the other subordinate, but both are nevertheless fellow-workmen."

The last case we shall refer to is that of Oakes vs. Mase, 165 U. S. 363, where it was declared to be the settled law of this court that the relation of fellow-servants exists between an engineer, operating a locomotive on one train, and the conductor on another train on the same road; and Northern Pacific Railroad vs. Poirier, 167 U. S. 48, where it was held that a brakeman on a regular train of a railroad and the conductor of a wild train, on the same road, are fellow-servants, and the railroad company is not responsible for injuries happening to the former by reason of a collision of the two trains, caused by the negligence of the latter and by his disregard of the rules of the company.

Without attempting to deduce from these cases a rule applicable to all possible circumstances, we think that we are warranted by them in holding in the present case that, in the absence of evidence of special and unusual powers having been conferred upon the conductor of the freight train, he, the engineer, and the brakeman, must be deemed to have been fellow-servants within the meaning of the rule which exempts the railroad company, their common employer, from liability to one of them for injuries caused by the negligence of another.

This conclusion is certainly sound unless we are constrained to hold otherwise by the decision in Chicago, Milwaukee & St. Paul Railroad vs. Ross, already referred to. That was a case wherein an action was

maintained, brought by a locomotive engineer to recover damages received in a collision caused by the negligence of the conductor of the train; and it must be admitted that the reasoning employed by MR. JUSTICE FIELD, in his opinion expressing the views of a majority of the court, and the conclusion reached by him, cannot be reconciled with the other decisions of this court hereinbefore cited. We do not think that it would be proper to pass by the case without comment, nor yet to attempt to distinguish it by considerations so narrow as to leave the courts below in uncertainty as to the doctrine of this court on a subject so important and of such frequent recurrence. The case in hand exemplifies the perplexity caused by the Ross case. The trial court gave effect to it as establishing the proposition that the conductor of an ordinary freight train, with no other powers than those assumed to belong to such an employé by virtue of such a position, is a vice-principal, against whose negligence the company is bound to indemnify all the other employés on the train. Yet it is evident that the judges of the Circuit Court of Appeals did not find themselves able to either accept or reject such a proposition, as they have certified it to us as one on which they desire our instructions. Such a course plainly evinces doubts whether, in view of the decisions both before and since, the case of Chicago, Milwaukee & St. Paul Railroad vs. Ross furnishes a safe and approved rule to guide the trial courts.

While the opinion in the Ross case contains a lucid exposition of many of the established rules regulating the relations between masters and servants, and particularly as respects the duties of railroad companies to their various employés, we think it went too far in holding that a conductor of a freight train is, *ipso facto*, a vice-principal of the company. An inspection of the opinion shows that that conclusion was based upon certain assumptions, not borne out by the evidence in the case, as to the powers and duties of conductors of freight trains. * * *

Cases are cited in the opinion in the Ross case in which it has been held by the Supreme Court of Ohio and by the Court of Appeals of Kentucky that railroad companies are responsible for negligence of conductors to other employés. But those courts do not accept the ordinary rule exempting the master from liability to a servant for the negligent conduct of his fellows. At least, they do not apply such a rule to the extent that this and other courts have done. They hold that no service is common that does not admit a common participation, and no servants are fellow-servants when one is placed in control over the other.

In so far as the decision in the case of Ross is to be understood as laying it down, as a rule of law to govern in the trial of actions against railroad companies, that the conductor, merely from his position as such, is a vice-principal, whose negligence is that of the company, it must be deemed to have been overruled, in effect if not in terms, in the subsequent case of Baltimore & Ohio Railroad vs. Baugh, before cited.

Little vs. Hackett, 116 U. S. 366. Supreme Court of the United States (1885).

Hackett hired a public cab at Long Branch, New Jersey, and directed the driver to take him to Hoey's Park. The cab crossed the tracks of the Central Railroad of New Jersey and was struck by a train, whereby Hackett was injured. He sued Little, who was the receiver operating the railroad. The evidence showed that the collision was due in part to negligence in the management of the train, but also that the driver of the cab had been negligent in going upon the track. The defendant insisted that Hackett was barred of relief by this contributory negligence of the cabman, relying upon the case of Thorogood vs. Bryan, 8 C. B. 114, decided in the English Court of Common Pleas in 1849, *Held,* however, disapproving that case, that one who hires a public hack, and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for the driver's acts or negligence.

FIELD, J.: The doctrine resting upon the principle that no one is to be denied a remedy for injuries sustained, without fault by him, or by a party under his control and direction, is qualified by cases in the English courts, wherein it is held that a party who trusts himself to a public conveyance is in some way identified with those who have it in charge, and that he can only recover against a wrongdoer when they who are in charge can recover. In other words, that their contributory negligence is imputable to him, so as to preclude his recovery for an injury when they by reason of such negligence could not recover. The leading case to this effect is Thorogood vs. Bryan, decided by the Court of Common Pleas in 1849, 8 C. B. 114. It there appears that the husband of the plaintiff, whose administratrix she was, was a passenger in an omnibus. The defendant, Mrs. Bryan, was the proprietress of another omnibus running on the same line of road. Both vehicles had started together and frequently passed each other, as either stopped to take up or set down a passenger. The deceased, wishing to alight, did not wait for the omnibus to draw up to the curb, but got out whilst it was in motion, and far enough from the path to allow another carriage to pass on the near side. The defendant's omnibus coming up at the moment, he was run over, and in a few days afterwards died from the injuries sustained. The court, among other things, instructed the jury, that if they were of the opinion that want of care on the part of the driver of the omnibus in which the deceased was a passenger, in not drawing up to the curb to put him down, had been conducive to the injury, the verdict must be for the defendant, although her driver was also guilty of negligence. The jury

found for the defendant, and the court discharged a rule for a new trial for misdirection, thus sustaining the instruction. The grounds of its decision were, as stated by MR. JUSTICE COLTMAN, that the deceased, having trusted the party by selecting the particular conveyance in which he was carried, had so far identified himself with the owner, and her servants, that if any injury resulted from their negligence, he must be considered a party to it: "In other words," to quote his language, "the passenger is so far identified with the carriage in which he is travelling, that want of care on the part of the driver will be a defence of the driver of the carriage which directly caused the injury." MR. JUSTICE MAULE, in the same case, said that the passenger "chose his own conveyance and must take the consequences of any default of the driver he thought fit to trust." MR. JUSTICE CRESSWELL said: "If the driver of the omnibus, the deceased was in, had, by his negligence or want of due care and skill, contributed to any injury from a collision, his master clearly could maintain no action, and I must confess I see no reason why a passenger, who employs the driver to carry him, stands in any different position." MR. JUSTICE WILLIAMS added that he was of the same opinion. He said: "I think the passenger must, for this purpose, be considered as identified with the person having the management of the omnibus he was conveyed by."

What is meant by the passenger being "identified with the carriage," or "with the person having its management," is not very clear. In a recent case, in which the Court of Exchequer applied the same test to a passenger in a railway train, which collided with a number of loaded wagons that were being shunted from a siding by the defendant, another railway company, BARON POLLOCK said that he understood it to mean "that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver." Armstrong vs. Lancashire & Yorkshire Railroad Co., L R. 10 Ex. 47, 52. Assuming this to be the correct explanation, it is difficult to see upon what principle the passenger can be considered to be in the same position with reference to the negligent act as the driver who committed it, or as his master, the owner. Cases cited from the English courts, as we have seen, and numerous other decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled to consideration.

The truth is, the decision in Thorogood vs. Bryan rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The par-

ties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world.

Thorogood vs. Bryan has not escaped criticism in the English courts. In the court of admiralty it has been openly disregarded. In The Milan, DR. LUSHINGTON, the judge of the High Court of Admiralty, in speaking of that case, said: "With due respect to the judges who decided that case, I do not consider that it is necessary for me to dissect the judgment, but I decline to be bound by it, because it is a single case; because I know, upon inquiry, that it has been doubted by high authority; because it appears to me not reconcilable with other principles laid down at common law; and, lastly, because it is directly against Hay vs. Le Neve and the ordinary practice of the court of admiralty." Lush. 388, 403.

In this country the doctrine of Thorogood vs. Bryan has not been generally followed.

Railway Company vs. Crain, 123 Md. 332 (1914).

A Mr. Goodman and his wife invited three friends, a man, Mrs. Crain, the plaintiff in this case, and another lady to ride with the Goodmans in their automobile. The two men sat in the front seat and the three women in the rear. Goodman, who drove, was but little acquainted with the road which they took, but had once been over it and knew that it somewhere crossed the line of the defendant railway company. He, therefore, requested the other man to look out for the track. Mrs. Crain, on the rear seat, overheard what Goodman said; but, as it was not addressed to her, she did not regard it as imposing any duty upon her, and she gave no attention to the road or to the management of the car.

When the crossing was reached, no one in the party recognized it, the carriage-road at this point being on the level of the track and the latter not being clearly distinguished by difference in appearance, although the line of the railway was indicated by trolley-poles which were visible to any one looking out for them. The automobile ran upon the track and was struck by a train travelling at a high speed; and in the collision Mrs. Crain sustained injuries on account of which she brought this action against the company.

At the trial there was no evidence of negligence on the part of the engineer operating the train except in respect of signaling his approach to the crossing by whistling and ringing, and on this point the testimony was conflicting. The defendant company insisted that, even though the engineer might have been negligent, the plaintiff herself had been guilty of contributory negligence in not looking out for the track and in allowing Goodman to drive upon the crossing without her notice and objection. To this the reply on behalf of the plaintiff was, that Goodman was the driver, and not she, and that she had no other responsibility in the matter than that of a passenger in a hired vehicle.

Held, that the plaintiff, though not chargeable with the negligence of the driver, was, in the circumstances of this case, as much bound as he was to observe the road and the dangers thereof; and that it should have been left to the jury to say whether or not she had exercised such care as was due to keep out of danger and to object to the risk taken.

NUISANCE.

St. Helen's Smelting Company vs. Tipping, 4 Best & S. 608: 11 House of Lords Cases, 642.
House of Lords (1865).

In June of 1860, Tipping purchased an extensive and valuable estate in a region in which was chiefly occupied by manufacturing industries, and in which the smelting of copper was largely carried on. About a mile and a half from the mansion house on Tipping's property were the copper smelting works of the defendant company. This establishment seems to have been not in operation, or but little used, before 1860; but in September of that year the company commenced smelting on a very large scale. The gases and other products generated by the operation of the works were carried to Tipping's estate; and these, being offensive to the senses, deleterious to health and injurious to vegetation, caused not only much personal discomfort but great damage to the property.

In 1863 Tipping brought this action against the company for the effects of the nuisance, and he proved the facts as here stated. The defence was put on the grounds: 1st, that the plaintiff had come to the nuisance; 2nd, that he was a recent purchaser, and so not entitled to the same consideration as one whose family had occupied the property for centuries; 3rd, that the region was one given over to industry, and that the public benefit derived from manufacturing ought to outweigh the inconvenience occasioned to an individual; and, 4th, that the value of the plaintiff's property was increased by the proximity of manufacturing establishments.

The trial judge instructed the jury that every man is bound to use his own property in such manner as not to injure the property of his neighbor, unless he has acquired by prescription a right to do so; that the law does not regard trifling inconveniences, and that, to be actionable, a nuisance must cause visible and substantial injury; and that, in counties where great works have been erected and carried on, which are the means of developing the national wealth, persons must not stand on

extreme rights and bring actions for matters of small consequence. The court took the sense of the jury on these questions:

Whether the plaintiff's enjoyment of his property was sensibly diminished; which the jury answered in the affirmative;

Whether the defendant's business was an ordinary business of smelting copper and conducted in as good and proper manner as possible; to which an affirmative answer was given; and,

Whether the defendant's business was carried on in a proper place; and this question was answered in the negative.

The plaintiff obtained a verdict for about £360, on which judgment in his favor was entered by the Court of Queen's Bench, 4 Best & S. 608. This judgment was affirmed by the Court of Exchequer Chamber, and, on appeal, was again and finally affirmed by the House of Lords, in which court opinions were delivered from which extracts are set out below.

MR. BARON MARTIN: My Lords, in answer to the questions proposed by your Lordships to the Judges, I have to state their unanimous opinion that the directions given by the learned Judge to the jury were correct, and that a new trial ought not to be granted. As far as the experience of all of us goes, the directions are such as we have given in these cases for the last twenty years.

WESTBURY, LORD CHANCELLOR: My Lords, in matter of this description it appears to me that it is a very desirable thing to mark the difference between action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, personal discomfort and interference with one's enjoyment, one's quiet, one's personal freedom, any thing that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another, and the result of that trade, or occupation, or business, is a material injury to property, there then unquestionably

arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors would not apply to circumstances the immediate result of which is sensible injury to the value of the property. * * *

The only ground upon which your Lordships are asked to set aside that verdict, and to direct a new trial, is this: That the whole neighborhood where these copper smelting works were carried on is a neighborhood more or less devoted to manufacturing purposes, of a similar kind, and therefore it is said that, inasmuch as this copper smelting is carried on in what the appellant contends is a fit place, it may be carried on with impunity, although the result may be the utter destruction or the very considerable diminution, of the value of the plaintiff's property. My Lords, I apprehend that that is not the meaning of the word "suitable" or the meaning of the word "convenient," which has been used as applicable to the subject. The word "suitable" unquestionably cannot carry with it this consequence—that a trade may be carried on in a particular locality, the consequence of which trade may be the injury and destruction to the neighboring property.

LORD CRANWORTH: In stating what I always understood the proper question to be, I cannot do better than adopt the language of MR. JUSTICE MELLOR. He says: "It must be plain that persons using a limekiln or other works, which emit noxious vapors, may not do an actionable injury to another; and that any place where such an operation is carried on so that it does occasion actionable injury to another is not, in the meaning of the law, a convenient place." I always understood that to be so; but, in truth, as was observed in one of the cases by the learned judges, it is extremely difficult to lay down any definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to, to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comforts of life and enjoyment of property. I perfectly well remember, when I had the honor of being one of the barons of the Court of Exchequer, trying a case in the county of Durham, where there was an action for injury arising from smoke in the town of Shields. It was proved incontestably that smoke did come, and in some degree interfere with a certain person; but I said: "You must look at it, not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields"; because, if it only added in an infinitesimal degree to the quantity of smoke, I thought that the state of the town rendered it altogether impossible to call that an actionable nuisance.

Salvin vs. Coal Company, L. R. 9 Ch. 705. Chancery (1874).

The plaintiff became the owner of a large estate in the neighborhood of which were many collieries, some of which had been worked for thirty years or more. Sometime afterwards the defendant opened a new shaft about four hundred yards from the plaintiff's dwelling house, and established, not far from that house, ovens for the making of coke in the manner which was customary in that region. Salvin brought this suit to restrain the company from prosecuting the manufacture of coke in these ovens, alleging that the smoke and gases generated in that business not only impaired his personal comfort but injured the trees and shrubbery upon his land. He was, however, unable to prove that a single tree or shrub had died since the opening of the ovens or that any substantial damage had actually been done. There was some evidence of scientific men to show that the vegetation had been injured, and would in the course of time be still more seriously injured, but the present damage was not perceptible to ordinary observation.

The injunction was denied, on the ground that, to entitle a party to relief in such a case, it must be shown that the damage complained of is visible, substantial and demonstrable as a present fact. And this ruling was sustained on appeal.

SIR G. JESSEL, M. R. (on the first hearing): * * * Such injury was not shown as in the St. Helen's case * * * No trees had died, and the woods of the plaintiff were in fair order; nor had the crops on the adjoining lands been injured. No doubt the ovens might have done some slight damage to the trees * * * not however visible to ordinary persons. * * * For these reasons, I think that the plaintiff has not made out his case; and that, as he comes here strictly upon legal grounds to ask for an injunction upon the ground of substantial injury, the only course I can now take is to dismiss the bill.

SIR W. M. JAMES, L. J. (on the appeal): * * * The Master of the Rolls derived from that case, St. Helen's Smelting Co. vs. Tipping, 11 H. L. C. 642, this principle: that, in any case of this kind, where the plaintiff was seeking to interfere with a great work carried on, so far as the work itself is concerned, in the normal and usual manner, the plaintiff must shew substantial, or as the Master of the Rolls expressed it, "visible" damage. * * * When the Master of the Rolls said that the damage must be visible, it appears to me that he was quite right; and, as I understand the proposition, it amounts to this, that, although,

when you once establish the fact of actual substantial damage, it is quite right and legitimate to have recourse to scientific evidence as to the causes of that damage, still if you are obliged to start with scientific evidence, such as the microscope of the naturalist, or the tests of the chemist, for the purpose of establishing the damage itself, that evidence will not suffice. The damage must be such as can be shewn by a plain witness to a plain common juryman.

The damage must also be substantial, and must be, in my view, actual; that is to say, the Court has, in dealing with questions of this kind, no right to take into account contingent, prospective, or remote damage * * *

I would illustrate this by analogy. The law does not take notice of the imperceptible accretions to a river bank or to the seashore, although after the lapse of years they become perfectly measurable and ascertainable; and if, in the course of nature, the thing itself is so imperceptible, so slow, and so gradual as to require a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation. * * * It would have been wrong, as it seems to me, for this Court in the reign of Henry VI. to have interfered with the further use of sea coal in London, because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen Victoria both white and red roses would have ceased to bloom in the Temple Gardens. If some picturesque haven opens its arms to invite the commerce of the world, it is not for this Court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitudes. * * * I think the plaintiff ought to be in the position of a man who has been nonsuited for want of sufficient evidence at the time. * * * I am of opinion that the decree of the Master of the Rolls ought to be affirmed, and that this appeal should be dismissed with costs.

Dittman vs. Repp, 50 Md. 516 (1879).

The complainant moved into a house situated next door to a brewery. At the time of the purchase he knew that the brewery was there, but noticed that it was quietly conducted. Later a new form of machinery was installed in the brewery, and the noise from it, and the vibrations set up by the force, shook the walls of the complainant's house to such a degree that the place was rendered unfit for habitation. The complainant sought an injunction to prevent the use of the new machinery, upon the theory that the noise and vibrations constituted a nuisance.

Held, that noise of such a character as to cause actual physical discomfort, combined with vibrations sufficient to render the complainant's house unfit for habitation, amounts to a nuisance which a court of equity will restrain.

Susquehanna Fertilizer Company vs. Malone, 73 Md. 268 (1890).

In 1880 the firm of Bowen & Mercer erected and began to operate, on land leased by them, a plant for the manufacture of fertilizers. In the following year Malone bought a tract of land adjoining that occupied by the factory, and on the land bought by him he built a hotel. Two or three years afterwards, the Susquehanna Company took over the Bowen & Mercer establishment, enlarged it, and carried on the making of fertilizers upon a larger scale. The result was that the offensive and deleterious gases generated in the factory, being carried by the wind to the hotel, damaged and discolored the woodwork and other parts of the latter building and rendered it unfit for habitation. Malone brought this action against the company, alleging that the factory constituted a nuisance to his property.

The principal ground of defence was that the fertilizer business antedated the building of Malone's hotel, and that he had come to the nuisance.

Held, notwithstanding this fact, that the action was maintainable.

ROBINSON, J.: No principle is better settled than that, where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owners, for which an action will lie. And this, too, without regard to the locality where such business is carried on; and this, too, although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business.

As far back as Paynton vs. Gill, 2 Rolle's Abr. 140, an action, it was held, would lie, for melting lead so near to the plaintiff's house as to cause actual injury to his property, even though the business was a lawful one, and one needful to the public; "for the defendant," says the court, "ought to carry on his business in waste places and great commons remote from inclosures, so that no damage may happen to the owner of adjoining property." And the doctrine thus laid down has been to this day the doctrine of every case in which a similar question has arisen.

We cannot agree with the appellant that the court ought to have directed the jury to find whether the place where this factory was located was a convenient and proper place for the carrying on of the appellant's business, and whether such a use of his property was a

reasonable use, and if they should so find, the verdict must be for the defendant. It may be convenient to the defendant, and it may be convenient to the public, but, in the eye of the law, no place can be convenient for the carrying on of a business which is a nuisance and which causes substantial injury to the property of another. Nor can any use of one's land be said to be a reasonable use, which deprives an adjoining owner of the lawful use and enjoyment of his property. * * *

So we take the law to be well settled that, in actions of this kind, the question whether the place where the trade or business is carried on, is a proper place for the purpose, or whether the use by the defendant of his own land is, under the circumstances, a reasonable use, are questions which ought not to be submitted to the finding of the jury.

We fully agree that, in actions of this kind, the law does not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; that in determining the question of nuisance in such cases, the locality and all the surrounding circumstances should be taken into consideration; and that where expensive works have been erected or carried on, which are useful and needful to the public, persons must not stand on extreme rights, and bring actions in respect of every trifling annoyance; otherwise, business could not be carried on in such places. But still, if the result of the trade or business thus carried on is such as to interfere with the physical comfort, by another, of his property, or such as to occasion substantial injury to the property itself, there is wrong to the neighboring owner for which an action will lie. *Smelting Co. vs. Tipping*, 11 H. L. 642. But, then, it is said, there was a fertilizer factory on the lot on which the appellant's works are now erected, and that this factory was used for the manufacture of sulphuric acid and fertilizers several years before the plaintiff built his house, and that the plaintiff has no right to complain because he "came to the nuisance." But this constitutes no defense in this action. If the appellant had acquired a prescriptive right, that is to say, a user of the place for twenty years, that would present a different question. But no such right is claimed in this case. And that being so, the appellant had no right to erect works which would be a nuisance to the adjoining land owned by the plaintiff, and thus measurably control the uses to which the plaintiff's land may in the future be subject. It could not, by the use of its own land, deprive the plaintiff of the lawful use of his property.

The question of coming to a nuisance was fully considered in *Bliss vs. Hall*, 4 Bing. N. C. 183, where, in an action for a nuisance arising from carrying on the business of making candles, the defendant pleaded that he had carried on his business at the same place, in the same manner and to the same extent, three years before the plaintiff became possessed of his messuage. In sustaining the demurrer to this plea, TINDAL, Chief Justice, says: "That is no answer to the complaint in the declaration; for the plaintiff came to the house he occupied with all the rights which the common law affords, and one of them is the right to wholesome air. Unless the defendant shows a prescriptive right to carry on his business in the particular place, the plaintiff is entitled to judgment."

NEGLIGENCE.

"Actionable negligence consists in the neglect of the use of ordinary care and skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property": per Brett, M. R., in

Heaven vs. Pender, L. R. 11 Q. B. D. 503.

Other definitions of negligence will be found in the text-books and in many reported cases, some of which cases are stated below. That above quoted seems the most adequate, particularly because it includes the essential elements of negligence, namely:

1. Failure to use due care and skill;
2. Damage due to such failure;
3. Absence of contributory negligence; and,
4. Duty owed to the person injured.

I. *Degree of Care.*

Due Care, or that degree of attention, caution and skill which is exacted by the law, is such care as would be exercised by an ordinarily careful, prudent and skillful man in the given situation. The legal standard of care is fixed by reference to the average of human caution and prudence, very much as probable cause is ascertained by reference to the mental processes of the average man: *ante,* p. 120. When the use of due care in a specific case is a question of fact, the verdict of a jury, a body comprising various degrees of intelligence and diverse habits of mind, is assumed to embody the judgment of the average man: see the observations of HUNT, J., copied in note to Vaughan vs. Menlove, *infra.* The degree of care legally requisite in a concrete case is, therefore, not that which happens to be fixed by the judgment of the person called upon to act, but is measured by a standard external to the individual. A defendant charged with negli-

gence does not exculpate himself by saying, or even by proving, that he used the best judgment of which he was capable; it must appear that he exercised such care as would seem sufficient to the man of ordinary caution and prudence:

Vaughan vs. Menlove, *infra,* p. 466.

Accordingly, where a bailee (though in this case a gratuitous bailee), has lost the goods entrusted to him, he may be held liable although he kept the bailor's goods with the same care that he kept his own; and the defendant was held liable for money left in his keeping by the plaintiff and stolen together with money of the defendant kept in the same drawer:

Doorman vs. Jenkins, 2 Ad. & E. 256.

The man of ordinary prudence usually regulates his conduct by a degree of care commensurate with the exigencies of the situation in which he is called upon to act, such as the gravity of the matter, the degree of risks involved, and the seriousness of the consequences which may result from misadventure. So the degree of diligence required by the law in various matters varies with the nature of the case and the circumstances, being proportioned to the value of the property which may be affected by negligence, the risk to human life or health, the degree and imminence of danger, and other incidents calling for greater or less attention, caution and skill. What would be due care in dealing with an article of slight value or substantial constitution might be gross negligence in the keeping or handling of something very costly or fragile; what would be ample attentiveness in driving a horse might be culpable negligence in managing a railway train. By the English law, the degree of caution requisite in dealing with certain highly dangerous articles is such an extreme exaction that practically it ceases to be a matter of due care and is hardly distinguishable from the

Duty to Insure other persons against injury from the use of such articles. Thus, if a man chooses to keep a wild animal that is dangerous to mankind, and the animal escapes

and does harm to anybody, the keeper is liable for the damage done without regard to whether he was or was not negligent in his custody of the animal:

May vs. Burdett, *infra*, p. 528.

So, if one brings upon his land a large quantity of water, which by escaping causes injury to his neighbor, liability is not conditioned upon negligence in the management of the water but upon the mere fact of damage done:

Fletcher vs. Rylands, *infra*, p. 529.

Where one maintained a large lamp in front of his premises and overhanging the street, and the lamp fell upon the sidewalk to the injury of a passer-by, the one who had kept the lamp over the street was held liable, although the accident was due to a latent defect in the lamp and the defendant was acquitted of any negligence:

Tarry vs. Ashton, L. R. 1 Q. B. 314 [1876].

With respect to fire-arms, the English law is almost or quite as stringent in fixing liability for accidents:

Dixon vs. Bell, *infra*, p. 527.

By the common law, every one who made a fire for any purpose did so at his peril, and was responsible if the fire should, although without any default of his, spread to the injury of his neighbors. With respect to fires made for domestic purposes, by Stat. 6 Anne (1707) this liability was modified so as to be conditional upon negligence; but concerning other fires the ancient rigor seems still to obtain in England:

Pollock on Torts (Am. ed.), 617.

In the United States such stringency has not been applied to cases of damage from fire and firearms, though slight negligence in the management of those things, and of like dangerous things, such as explosives, gas and electricity, will fix a liability. The American law concerning the keeping of dangerous beasts is

probably identical with the English. The doctrine as established in Fletcher vs. Rylands has not found favor in the United States generally. Few of the American courts have given it unqualified approval, and in New York, New Jersey and other States, the doctrine of the case has been declared in conflict with the settled law of this country: Burdick on Torts, 506, 507; Losee vs. Buchanan, 51 N. Y. 476; Brown vs. Collins, 53 N. H. 442; Marshall vs. Wellwood, 38 N. J. L. 339.

II. *Evidence of Negligence.*

The Burden of Proof is on him who alleges negligence, the fact of negligence being never presumed, but always one to be affirmatively established. Although negligence on the part of the defendant may often be inferred from the nature and circumstances of the case as shown in evidence, it is incumbent upon the plaintiff to prove facts which demonstrate delinquency; and when the facts proved are equally consistent with the defendant's negligence and with his innocence, the plaintiff fails. If, for example, all that appears is that a man was struck by a car, it is as reasonable to suppose that the man walked against the car as that the car ran against the man:

Cox vs. Burbridge, *infra,* p. 469;
Patton vs. Railway Co., *infra,* p. 470;
Cotton vs. Wood, *infra,* p. 472;
Hammack vs. White, *infra,* p. 474.

The rule on this point is subject to two qualifications: the one applying to cases involving breach of contract; and the other being the principle embodied in the expression *res ipsa loquitur.*

I. **The Breach of a Contract** for the safe keeping of goods, or for the safe carriage of goods or a passenger, being proved, affords *prima facie* proof of negligence on the part of the bailee or the carrier; and evidence of such fact dispenses with proof as to the actual existence or any specific mode of negligence. The breach of contract being shown, warrants an inference that the default is due to the bailee's negligence, and casts upon him the obligation to rebut that inference by so

explaining his failure as to show that it did not involve negligence. Where one entrusted with the goods of another fails to produce them upon proper demand, his inability is presumably due to negligence, and the default is of itself sufficient to warrant holding him liable unless he can account for the loss of the goods in some way which excludes delinquency on his part. So, where a passenger is injured while in course of transportation by a common carrier, the fact of the injury constitutes a *prima facie* case of negligence in the carrier, and imposes upon the latter the burden of showing that the accident occurred without fault in the management of the train:

Gleeson vs. Railroad Co., 140 U. S. 435;
Railway Co. vs. Svedborg, 20 App. D. C. 543; affirmed 194 U. S. 201.

In such cases the defendant may exonerate itself by showing that the injury to the passenger occurred without negligence on its part, as from the passenger's own negligence, or from the act of some third person, or from inevitable accident:

Sullivan vs. Traction Co., *infra,* p. 482.

II. **Res Ipsa Loquitur**—the thing itself speaks—imports that the mere occurrence of the accident proved is sufficient to warrant the presumption that the accident was due to negligence. The maxim applies to cases wherein the fact shown is of such a nature that it would probably not have occurred unless some one had been negligent; as where the plaintiff, being in the street, was struck by a brick which fell from a bridge maintained by the defendant; here, although there was no specific proof showing that the defendant had been negligent in the repair of the bridge, the loosening of the brick was sufficient to establish default:

Kearney vs. Railway Co., L. R. 6 Q. B. 759.

Other cases exemplifying the same principle are stated below:

Byrne vs. Boadle, *infra,* p. 475;
Coasting Co. vs. Tolson, *infra,* p. 476;
Christie vs. Griggs, *infra,* p. 478.

Cases in which the rule on this subject has been limited or explained, are

Sweeney vs. Erving, *infra,* p. 479;
Sullivan vs. Traction Co., *infra,* p. 482.

III. *Contributory Negligence.*

By the older common law, a plaintiff suing for injury caused by the negligence of the defendant was denied recovery if it appeared that the injury was due in any degree to the plaintiff's own negligence, whether proximate or remote, contributing to the accident. "In other words, the plaintiff is bound to prove that the harm was due solely to the defendant's negligence": Burdick on Torts, pp. 487, 490.

In an action for injuries arising from negligence, it was always a defence that the plaintiff had failed to show that, as between him and the defendant, the injury had happened solely by the defendant's negligence. If the plaintiff, by some negligence of his, directly contributed to the injury, it was caused by the joint negligence of both, and no longer solely by the negligence of the defendant, and that formed a defence to the action: per LORD ESHER, M. R., in Thomas vs. Quartermaine, L. R. 18 Q. B. D. 685, 688 [1887].

This rule seems still to obtain in a few of the United States.

The question to be determined in every case is, not whether the plaintiff's negligence caused, but whether it contributed to, the injury of which he complains: Railway Co. vs. Cromer, 99 Va. 763.

Three qualifications of this rule are established in modern practice, the last named of the three being of quite recent introduction and substantially modifying the former doctrine: (1) the special rule applicable in cases of peril to human life; (2) the exception in favor of children; and (3) the doctrine of the Last Clear Chance.

1. **Imminent Danger to Human Life** will, in some cases, render that which otherwise would be contributory negligence an act of excusable risk; as where life is imperilled by the

negligence of the defendant and the plaintiff has ventured his own safety for the sake of saving the person in danger:
Steel Co. vs. Marney, *infra*, p. 485.

So, where a hand-car had been left upon the track of a railway, where it caused imminent danger to an approaching passenger train, and the plaintiff was injured in an endeavor to remove the obstruction, he was held entitled to recover notwithstanding the obvious hazard of his undertaking: "Such conduct was not negligence, but heroism": Railway Co. vs. Krayenbuhl, 48 Nebraska, 553.

In some cases of less gravity, as where only risk to property or some personal inconvenience is involved, the defendant who has created the dangerous situation will be liable for injury sustained by the plaintiff acting therein, although the plaintiff's conduct be in some degree imprudent: one who has caused a nuisance or perillous condition cannot escape the consequences of his conduct because other persons are thereby obliged to take some risks.

Thus, the defendants being engaged in constructing a sewer, had made a trench of considerable width and depth in front of the stable in which the plaintiff, a cabman, kept his horses, and along the margin of the trench had been thrown up a ridge of loose earth and rubbish, which made the exit of horses from the stable difficult and in some degree dangerous. The defendants advised the plaintiff not to risk taking his horses over the margin; but he found it necessary to do so, and, as one of the horses was conducted over the debris, the loose material gave way and the horse slipped into the trench, where he died. The jury were instructed that, if the plaintiff had rashly incurred a manifestly great danger, he was not entitled to recover; but that he was not bound to refrain from coming out of the stable merely because the defendants had made the passage somewhat dangerous, the defendants not being entitled to keep the stable in a state of siege until they should find it convenient to make the situation entirely safe; and it was left to the jury whether the plaintiff had persisted in running upon a great and obvious danger. The jury found for the plaintiff, and the instructions given at the trial were held to be correct: Clayard vs. Dethicks, 12 Q. B. 439.

2. **Young Children** and other incapables are judged as to their responsibility for contributory negligence with regard to the standard of intelligence and discretion which may reason-

ably be expected in them, the degree of discretion exacted varying with the age and other characteristics of the person concerned. The extent to which this indulgence to the deficiencies of the youthful judgment has been established is shown in

Lynch vs. Nurdin, *infra,* p. 487;
Railroad Co. vs. Stout, *infra,* p. 490;
Railway Co. vs. McDonald, *infra,* p. 492;
Hayes vs. Railroad Co., *supra,* p. 69.

So a water company was held liable for the death of a small boy who, while fishing in the company's reservoir, fell in and was drowned; Price vs. Water Co., 58 Kansas, 551; and the owner of a foundry for injury sustained by an infant trespasser who ventured too near to an open vat containing hot grease: Duffy vs. Iron Works, 210 Pa. St. 326. Besides a quite large number of turn-table cases, there are many which hold the proprietor of land liable to infants who are hurt by things upon his premises which are attractive to children; as an unguarded pond: Pekin vs. McMahon, 154 Ill. 141; Franks vs. Oil Co., 78 S. C. 10.

Although the case of Lynch vs. Nurdin seems still regarded as authority in England, there are some later cases which are hardly reconcilable with the doctrine there laid down: thus a defendant, who had left his cellar-door standing open, was held not liable for injury suffered by a boy of seven who was hurt by the falling of the door: Hughes vs. McFie, 2 H. & C. 744 [1863]; and a defendant who had left a machine for crushing oil-cake standing in a public place was held not responsible to a child four years of age whose fingers were hurt while he was playing with the machine: Mangan vs. Atterton, L. R. 1 Exch. 239 [1866].

In the United States a number of courts have, more or less strongly, disapproved of the Stout case and the cases declaring the same doctrine—a doctrine which puts the responsibility of taking care for the child upon everybody but the child's parents—and in some States that doctrine is wholly repudiated: Burdick on Torts, p. 526. Most of the cases on the subject are reviewed, and it is held that an owner of land is not liable for the death of a boy who is drowned while bathing in a pond upon the defendant's premises, in

Sullivan vs. Huidekoper, 27 App. D. C. 154 [1906].

3. **Last Clear Chance** is the name given to the modern rule which materially modifies the older common law respecting contributory negligence. The effect of the present doctrine is to engraft upon the former rule a qualification having regard to the principle of Proximate Cause. Instead of holding that a plaintiff is disentitled to recover if he has, at any point in the transaction, been guilty of negligence which in part caused his injury, the English and most American courts look to the proximate cause of the mischief; and if it appears that, while the plaintiff has been at fault so as in some degree to contribute to his injury, yet, if the immediate or decisive cause of the mischief was negligence on the part of the defendant, the latter will be held liable notwithstanding the former negligence of the plaintiff.

Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years, (having been first enunciated in Davies vs. Mann, 10 M. & W. 546.) that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence: Railway Co. vs. Ives, 144 U. S. 408.

Contributory negligence in a plaintiff only means that he himself has contributed to the accident in such a sense as to render the defendant's breach of duty no longer its proximate cause. * * * It rests upon the view that, though the defendant has in fact been negligent, yet the plaintiff has, by his own carelessness, severed the causal connection between the defendant's negligence and the accident which has occurred: per BOWEN, L. J., in Thomas vs. Quartermaine, L. R. 18 Q. B. D. 685.

The development of this doctrine is fairly shown, and its application variously exemplified, in

Butterfield vs. Forrester, *infra,* p. 495;
Davies vs. Mann, *infra,* p. 496;
Tuff vs. Warman, *infra,* p. 497;
McNab vs. Railways Co., *infra,* p. 501, and other cases stated below.

IV. *The Duty to Use Care.*

In order to answer the . . . inquiry, whether the defendant had been guilty of negligence, the first step to be taken must be to consider what is the duty towards the plaintiff that it is alleged the defendant has broken—for the ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody: BOWEN, L. J., in Thomas vs. Quartermaine. L. R. 18 Q. B. D. 685.

The duty to use care in a given case is, therefore, owed only to certain persons; and the character and degree of the obligation may vary greatly according to the great variety of relations and circumstances in which the obligation originates. A railway company owes a certain kind and amount of care to its passengers, this duty being annexed to the contract of carriage; the company is bound to other kinds and degrees of care towards its employees, by reason of the relation of master and servant; to the public brought into contact with the company's property its duties are again different; while to the tramp stealing a ride upon one of its trains, the only duty is the negative one, not wantonly to do him injury. The owner of a mill who uses dangerous machinery owes one kind and degree of care to his employees, another degree to those who visit the mill for their own purposes, another duty still to those who come by his invitation, and a different character and degree of duty to mere trespassers.

Origin of Duty. The duty to use care may arise:

1. From Contract Relation: as in the case of carrier and passenger, in which the latter is entitled to exact of the former a certain measure of care by reason of the contract of carriage; and so, where a carter undertakes to transport goods, a surgeon to treat a patient, or an attorney to render professional service, in each case there results from the undertaking a legal duty to avoid negligence in the execution of the undertaking;

2. From Statutory Requirement: as where the legislature prescribes in certain situations the use of specified safeguards

or the observance of specified precautions to prevent accidental injuries; or

3. From Common Law Principles applicable to the relations to each other in which the parties have placed themselves or into which they have been brought by circumstances; as where two persons approach each other in a highway, in which case the common law imposes upon each the duty of care to avoid collision with the other; or where a vendor sells an article which is, or may become, dangerous by reason of some defect therein, whereupon the law raises certain duties to the vendee and to other persons who may become concerned; or where the owner of land invites or permits other persons to use his premises, by reason of which action the law imposes upon him certain duties in respect of keeping his premises safe, these duties varying in character and exigency according to the various relations which he assumes toward the other persons.

The Extent of the Duty owed in any specific case depends somewhat upon the manner in which the duty arises, and somewhat also upon the nature of the subject-matter to which the duty relates. Thus, where the obligation to avoid negligence results only from contract relations, the duty is owed only to the other contracting party; and in that kind of a case, if third persons should be prejudiced by negligence in the performance of the contract, they cannot, so far as the delinquency is only in respect of contractual obligations, hold the negligent contractor liable:

Winterbottom vs. Wright, *infra,* p. 513;
Savings Bank vs. Ward, *infra,* p. 519.

So the owner of land may subject himself to the duty of keeping his property more or less safe by permitting or inviting other persons to come upon the premises; that is to say, by assuming certain relations with other persons in respect of the property. But his obligation in this regard extends only to those particular persons to whom he has, expressly or by implication, extended such permission or invitation;

in other words, his duty to keep the premises safe is owed only to the persons to whom he has limited the relationship which creates the duty. In such a case, moreover, the character and degree of the duty arising depends upon the character in which the persons coming upon the land are authorized to come, there being one kind of duty owed to mere licensees and other kinds of duty owed to visitors of other characters; but whatever the duty, it is limited by the nature of the case out of which it grows.

Liability for Dangerous Articles. Although in such cases as those just instanced the liability for negligence is limited to the parties to the particular transaction, or to one of them, it may happen that the transaction is of such a nature that it creates a duty towards other persons than those immediately and originally concerned. Thus, one party to a contract may be guilty of negligence in the performance of his obligations, which would be a breach of duty toward the other contracting party; but the same negligence may result in the delivery by one of the contracting parties to the other of a dangerous article, by which some third person into whose use it indirectly comes is, without fault on his part, injured: as where a defective gun was sold to a father, who lent it to his son, and the son was hurt by the bursting of the gun. In such a case it is clear that the injured person cannot claim the violation of any duty to himself which grows out of the contract of sale; and if the case is such that the obligation of the delinquent vendor is limited, by the character of the contract or the nature of the subject-matter, to the vendee, the third person has no redress: as in Winterbottom vs. Wright and Bank vs. Ward, cited above.

In the case, however, of the defective gun, there is something more than the negligent—or in that particular instance, the fraudulent—performance of a contract; the transaction involves putting into circulation an article which is dangerous to life and by which some originally unidentified individual is likely to be harmed. The negligent vendor is, therefore, guilty of a breach of duty which is distinct from a violation of the duty owed to the vendee, and which is the same kind of delinquency

of which one is guilty who negligently suffers a wild beast to escape or is negligent in his management of fire, fire-arms, explosives, or poisons. On principle, it would seem that one who, whether by way of contract or otherwise, creates such peril to persons not parties to any contract with himself, should be answerable to whomsoever may be injured by the dangerous article, the defendant's liability in this aspect being altogether collateral to any contractual obligations that may exist in the transaction.

In a certain class of cases this principle appears to be established, that is to say, the delinquent dealer is liable to third persons where the article sold is intrinsically and imminently dangerous to human life or health; and the decisions which deny such liability to third persons where the obligation is limited to the contractual duty insist upon a distinction between things which are in themselves and highly dangerous—such as poisons, explosives and the like—and those things which are ordinarily harmless and not likely to cause injury even when defective. To what extent it may be taken as established, that one who negligently sells or bails to another an article in any degree dangerous commits a breach of duty toward a third person who is harmed by the article, it is difficult to say; there is difficulty, and some doubt, in determining what is greatly and in itself dangerous, and what is so only because of accidental circumstances. The earlier cases evince an indisposition to extend liability beyond the original parties to the transaction: Langridge vs. Levy; Winterbottom vs. Wright; those which undertake to distinguish between dangerous articles and those not dangerous are not always harmonious, and perhaps not wholly satisfactory, in their distinctions: Longmeid vs. Holliday, *infra;* and the later decisions are not easily reconciled with each other or with any consistent principle: the lack of logic in the adjudications is mentioned by Mr. Wigmore in a passage appended *infra* as a note to Winterbottom vs. Wright.

In these cases, wherein third persons had been injured from defects in articles negligently supplied by manufacturers or other vendors to immediate vendees, it was held that the injured persons could not recover against the delinquent dealers because the liability of such

dealers was limited to those with whom they were in contract relations: where a defective lamp was sold: Longmeid vs. Holliday, 6 Exch. 764; a defective chain: Blakemore vs. Ry. Co., 8 E. & B. 1035; a chandelier improperly hung: Collis vs. Selden, L. R. 3 C. P. 495; a defective valve in an oil car: Goodlander vs. Oil Co., 63 Fed. 401; a porch to a hotel: Curtain vs. Somerset, 140 Pa. St. 70; a balance-wheel: Loop vs. Litchfield, 42 N. Y. 351; a bridge: Marvin Safe Co. vs. Ward, 46 N. J. L. 19. In Loop vs. Litchfield, *supra*, the opinion insists upon the distinction between articles not dangerous in nature and those which are necessarily and highly dangerous, such as the poison in Thomas vs. Winchester.

In each of these cases a dealer who negligently supplied a customer with a defective article was held liable to a third person injured by reason of the defect: where the thing sold was a folding-bed which collapsed and injured a lodger in the house of the customer: Lewis vs. Terry, 111 Calif. 39; where highly explosive oil was sold: Wellington vs. Oil Co., 104 Mass. 64; Elkins vs. McKean, 79 Pa. St. 493; hogs known to be diseased: Skinn vs. Reuther, 135 Mich. 57; inflammable stove-polish: Clement vs. Crosby, 148 Mich. 293. Where the maker of a heavy roller, by plugging and painting, concealed the presence of some large knot-holes in the machine, and sold it to a dealer, and the dealer sold it to a farmer, who was injured in using the roller, the farmer was held entitled to recover against the maker: Kuelling vs. Mfg. Co., 183 N. Y. 78. Where the defendant, a chemist, sold to the plaintiff's husband a hair-wash containing deleterious ingredients, and the vendee gave it to his wife, who used it and was injured by it, the chemist was held liable to the wife: George vs. Skivington, L. R. 5 Exch. 1. The defendant was the owner of a dry-dock and contracted with one Gray, a master painter, for the painting of a ship. Gray sent the plaintiff to do the work; the defendant supplied the plaintiff with some ropes by which to suspend the staging to be used in painting; the ropes proved defective, as the defendant would have known had he not been negligent, and the plaintiff was injured by the fall of the staging; the defendant was held liable to the plaintiff: Heaven vs. Pender, L. R. 11 Q. B. 503, reviewing the English cases.

The development of the doctrine on this subject, and its various applications, are outlined in these cases which are stated below:

Langridge vs. Levy, *infra*, p. 510;
Thomas vs. Winchester, *infra*, p. 517;
Huset vs. Case Co., *infra*, p. 523;
State vs. Fox, *infra*, p. 527.

In a more recent case, the defendant, a wholesale dealer in oil, had sold to a retailer as coal oil a very inflammable mixture of coal oil and gasoline, the sale of such a composition being prohibited by statute;

some of the oil was sold by the retailer, without knowledge on his part of its dangerous character, to a customer; in the use of the oil, the customer's house was set on fire and destroyed and his wife and children killed; to the contention that the company was not liable to the customer because there were no contractual relations between them, it was answered:

"From these facts it is apparent that the responsibility of the oil company rested not on contract but in tort, and therefore the contention as to the want of contractual relation is irrelevant": per WHITE, J., in Oil Company vs. Deselms, 212 U. S. 159.

Liability for Premises. The owner of real property is, as owner, not bound to keep it in any particular condition or to provide for the safety of other persons who may, for purposes of their own, come upon it. He must not, however, allow the premises to become a nuisance; and he creates a nuisance, for which he is liable to any one thereby injured, if he digs a pit or does other work upon his land so near to a public way as to be dangerous to those passing:

Barnes vs. Ward, *infra,* p. 541.

If, however, the dangerous construction is so far from the highway that persons using the way must leave it and become trespassers before they are exposed to peril, the owner is not answerable for accidents so occasioned:

Hounsell vs. Smyth, *infra,* p. 539;
Hardcastle vs. Railway Co., *infra,* p. 542;
Blyth vs. Topham, Cro. Jac. 158.

But the owner may, by acts of his in relation to his property, create a duty toward other persons obliging him to varying degrees of care concerning the safety of the premises. The liability for the condition of the place may be considered with reference to:

1. *Trespassers,* that is, persons who come upon the land wholly without authority from the owner; to these the owner owes no duty except, negatively, not wantonly to injure them. To such a person the proprietor is not liable for negligence in the management of his property:

Mergenthaler Co. vs. Kirby, *infra,* p. 543.

2. *Licensees,* or persons who use the premises with the owner's permission but without other right, and wholly for purposes of their own; to these the owner has no obligation to keep his property safe, but only not to create thereon any secret danger which may injure them—not to lay traps for them:

Maenner vs. Carroll, *infra,* p. 542;
Hounsell vs. Smyth, *infra,* p. 539;
Benson vs. Tracton Co., *infra,* p. 538.

3. *Invited Visitors,* that is, persons coming by invitation but for purely social persons; these are only licensees, and the host assumes toward them no other duty than he owes to other licensees:

Southcote vs. Stanley, *infra,* p. 537.

4. *Customers,* including all who come, by invitation express or implied, not necessarily to buy goods from the owner, but for any business which concerns him; as a mechanic sent for to do work upon the premises, or a passenger using the carrier's premises incidentally to his journey upon the carrier's line:

Indermaur vs. Dames, *infra,* p. 543;
Bennett vs. Railroad Co., *infra,* p. 545.

To persons of this class the landowner owes the affirmative duty to keep his premises in a reasonably safe condition.

5. *Tenants.* In the letting of real property there is, on the part of the lessor, no implied covenant, warranty or representation that the premises are in any particular condition, or that they are safe or fit for habitation or for any other use:

Viterbo vs. Friedlander, 120 U. S. 707;
Doyle vs. Railway Co., 147 U. S. 413.

Although the lessor knows, and the lessee does not know, that the premises are unsafe, the former is not, in the absence of fraudulent representation or concealment, liable for accidents

due to the dangerous condition, nor is the latter relieved from the obligation to pay rent:

Keates vs. Cadogan, 10 C. B. 591;
Bowe vs. Hunking, 135 Mass. 380; cited in Doyle vs. Railway Co., *supra.*

In a case where the lessor does not know of any dangerous defect in the property, he is not liable for any injury therefrom sustained by the tenant, although the lessor might have discovered the defect by moderate diligence:

Howell vs. Schneider, *infra,* p. 552.

The lessor is not liable, nor is the lessee discharged of the obligation to pay rent, because the house proves to be uninhabitable:

Hart vs. Windsor, *infra,* p. 549;
Fisher vs. Lighthall, *infra,* p. 549.

These principles are subject to qualification in respect of two classes of tenancies:

1. Where the letting is of furnished lodgings, being principally a contract for the use of personal property:

Smith vs. Marrable, *infra,* p. 548;
Hart vs. Windsor, *infra,* p. 549.

2. Where the letting is of an apartment in an apartment house:

O'Hanlon vs. Grubb, *infra,* p. 554.

Vaughan vs. Menlove, 3 Bingham's New Cases, 468. Common Pleas (1837).

THE SPONTANEOUS COMBUSTION CASE.

The defendant had upon his land, in the summer of 1835, a stack of hay. Owing to the prevailing weather, there was in the neighborhood much apprehension of spontaneous combustion; and, while there were conflicting opinions as to the likelihood of such an occurrence, the defendant had been advised

that his hay was in danger and also dangerous to others. To such advice he responded that he "would chance it." He did, however, make an aperture or chimney through the body of the stack; "but, in spite, or perhaps because of, this precaution, the rick at length burst into flames from the spontaneous heating of its materials." The flames spread across the defendant's boundary and destroyed some cottages belonging to the plaintiff. The latter sued Menlove, alleging that the loss of the cottages was due to the defendant's negligence in the keeping of his hay stack.

At the trial, the jury were told to find for the plaintiff if they thought that the fire had been occasioned by gross negligence on the part of the defendant, the court saying he had been bound to proceed with such reasonable caution as a prudent man would have exercised under such circumtsances. A verdict for the plaintiff having been returned, the defendant moved for a new trial on the ground that the jury had been directed to consider whether the defendant's conduct had been negligent with reference to the standard of ordinary prudence—"a standard too uncertain to afford any criterion;" and it was argued that the test that should have been prescribed was "whether he had acted *bona fide* to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence."

The motion was overruled and a judgment entered for the plaintiff.*

TINDAL, C. J.: It is contended, however, that the learned judge was wrong in leaving this to the jury as a case of gross negligence, and that

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*HOLMES, J.: It is quite true that negligence must be determined upon the facts as they appeared at the time, and not by a judgment from actual consequences which then were not to be apprehended by a prudent and competent man. This principle nowhere has been more fully recognized than by this court; Lawrence vs. Minturn, 17 How. 100; The Star of Hope, 9 Wall. 203. But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned. The notion, that it "should be coextensive with the judgment of each individual," was exploded, if it needed exploding, by CHIEF JUSTICE TINDAL in Vaughan v. Menlove, 3 Bing. N. C. 468, 475. And since then, at least, there should be no doubt about the law: The Germanic, 196 U. S. 589.

"Suppose that a defendant were allowed to testify that, before acting, he considered carefully what would be the conduct of a prudent man under the circumstances, and, having formed the best judgment he could, acted accordingly. If the story was believed, it would be conclusive against the defendant's negligence, judged by a moral

the question of negligence was so mixed up with reference to what would be the conduct of a man of ordinary prudence that the jury might have

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standard, which would take his personal characteristics into account. But, supposing any such evidence to have got before the jury, it is very clear that the court would say, Gentlemen, the question is, not whether the defendant thought his conduct was that of a prudent man, but whether you think it was [Blyth vs. Waterworks Co., 11 Exch. 781; Smith vs. Ry. Co., L. R. 5 C. P. 98, 102].

"Some middle point must be found between the horns of this dilemma.

"The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his consequential defects will be allowed for in the courts of Heaven; but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors, accordingly, require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.

"The rule, that the law does, in general, determine liability by blameworthiness, is subject to the limitation that minute differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts, it is our misfortune; so much as that we must have at our peril, for the reasons just given. But he who is intelligent and prudent does not act at his peril, in theory of law. On the contrary, it is only when he fails to exercise the foresight of which he is capable, or exercises it with evil intent, that he is answerable for the consequences: O. W. Holmes, Jr., The Common Law, p. 107.

HUNT, J.: It is true, in many cases, that, where the facts are undisputed, the effect of them is for the judgment of the court, and not for the decision of the jury. . . . If a coachman intentionally drives within a few inches of a precipice, and an accident happens, negligence may be ruled as a question of law. On the other hand, if he had placed a suitable distance between his coach and the precipice, but by the breaking of a rein or an axle, which could not have been anticipated, an injury occurred, it might be ruled as a question of law that there was no negligence and no liability.

But these are extreme cases. The range between them is almost infinite in variety and extent. It is in relation to these intermediate cases that the opposite rule prevails. Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be clearly established, from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases, and those akin to it, that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experiences of the affairs of life to the facts proven, and draw a unanimous conclusion. The average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge: R. R. Co. vs. Stout, 17 Wall. 657."

thought the latter the rule by which they were to decide; that such a rule would be too uncertain to act upon; and that the question ought to have been, whether the defendant had acted honestly and *bona fide* to the best of his own judgment. That, however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various; and, though it has been urged that the care which a prudent man would take is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in Coggs vs. Bernard, 2 Ld. Raym. 909.
* * *

Instead, therefore, of saying that the liability for negligence should be coextensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe.

Evidence of Negligence.

Cox vs. Burbridge, 13 C. B. N. S. 430. Common Pleas (1863).

The defendant's horse was grazing in a highway, there being no proof as to how he came to be there. The plaintiff, a boy of five years, was playing in the highway, and was kicked by the horse, there being no proof as to any of the circumstances of that fact. There was no proof that the horse had been known to be vicious. *Held,* that there was no evidence which would warrant the jury in finding the defendant guilty of actionable negligence.

ERLE, C. J.: As between the owner of the horse and the owner of the soil of the highway, or of the herbage growing thereon, we may assume that the horse was trespassing; and, if the horse had done any damage to the soil, the owner of the soil might have had a right of action against his owner. So, it may be assumed that, if the place in question were a public highway, the owner of the horse might have been liable to be proceeded against under the Highway Act. But, in considering the claim of the plaintiff against the defendant for the injury sustained from the kick, the question whether the horse was a trespasser as against the owner of the soil, or whether his owner was amenable under the Highway Act, has nothing to do with the case of the plaintiff.

I am also of opinion that so much of the argument which has been addressed to us on the part of the plaintiff as assumes the action to be founded upon the negligence of the owner of the horse in allowing it to be upon the road unattended, is not tenable. To entitle the plaintiff to maintain the action, it is necessary to show a breach of some legal

duty due from the defendant to the plaintiff; and it is enough to say that there was no evidence to support the affirmative of the issue that there was negligence on the part of the defendant for which an action would lie by the plaintiff. The simple fact found is, that the horse was on the highway. He may have been there without any negligence on the part of the owner; he might have been put there by a stranger, or might have escaped from some enclosed place without the owner's knowledge. To entitle the plaintiff to recover, there must be some affirmative proof of negligence in the defendant in respect of a duty owing to the plaintiff.

But, even if there was any negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was on the highway and that, without anything to account for it, he struck out and injured the plaintiff. I take the well-known distinction to apply here, that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such an animal, and the owner knows it. Thus, in the case of a dog, if he bites a man or worries sheep, and his owner knows that he is accustomed to bite men or to worry sheep, the owner is responsible; but the party injured has no remedy unless the *scienter* be proved. This is very familiar doctrine; and it seems to me that there is much stronger reason for applying that rule in respect to the damage done here. The owner of a horse must be taken to know that the animal will stray if not properly secured, and may find its way into his neighbor's corn or pasture. For a trespass of that kind, the owner is of course responsible. But if the horse does something which is quite contrary to his ordinary nature, something which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has; and everybody knows that it is not the ordinary habit of a horse to kick a child on a highway. I think the ground upon which the plaintiff's counsel rests his case fails. It reduces itself to the question whether the owner of a horse is liable for a sudden act of a fierce and violent nature which is altogether contrary to the usual habits of the horse, without more.

Patton vs. Texas and Pacific Railway Company, 179 U. S. 658 (1901).

Patton was a fireman employed on a train of the defendant company which ran between El Paso and Toyah. Among his other duties was that of cleaning that portion of the engine above the running board, which was done after the return of the train to El Paso. On one occasion after finishing this work, he left the engine, using in his descent a step which was fixed eighteen inches below the floor of the cab by a rod which ran up through

the framework of the engine and was held in place by a nut screwed at its upper extremity. This nut being insecurely fastened, the step was loose and turned under the plaintiff, whereby he was thrown under the wheel of the engine and was injured.

The nut had been properly screwed on at El Paso before the train left that place. The engine had been inspected at El Paso and at Toyah, and no defect had been found in the step. The engineer had used the step a few hours before on his return to El Paso and found it secure, and in his report of work needed on the engine made no mention of any defect in the step. There was evidence to the effect that the nut might be loosened by the jar of the train in such a run as that between El Paso and Toyah, and there was other evidence to the effect that it could not be loosened by such use if it had been securely fastened in the first place. The engine had been coaled after returning to El Paso. There was no evidence showing from what cause the nut had become loosened. In the trial court the jury was instructed to return a verdict for the defendant, on the ground that there was no proof of negligence on its part.

Held, that this direction was correct.

BREWER, J.: From this outline it appears that the master provided perfectly suitable appliances, and appliances in good condition; that they were properly secured when the engine started on its trip; and that it is impossible to tell from the testimony how the step was loosened. It may have been from the ordinary working of the engine, the possibility of which was testified to by the superintendent, who had had long experience with engines. It may have been because the step struck something on its trip, which striking might produce that result according to the testimony of other experts, who denied that the ordinary working of the engine would loosen it. * * * It may have resulted from the dropping on the step of some of the large lumps of coal which were thrown into the tender after reaching El Paso. * * * it is a mere matter of conjecture as to how the step came loose. * * *

Upon these facts we make these observations: First, That, while in the case of the passenger, the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely, Stokes vs. Saltonstall, 13 Pet. 181; Railroad Company vs. Pollard, 22 Wall. 341; Gleeson vs. Midland Railroad, 140 U. S. 435; a different rule obtains as to an employé. The fact of accident carries with it no presumption of negligence on the part of the

employer, and it is an affirmative fact for the injured employé to establish that the employer has been guilty of negligence: Texas & Pacific Railway vs. Barrett, 166 U. S. 617. Second, That in the latter case it is not sufficient for the employé to show that the employer may have been guilty of negligence—the evidence must point to the fact that he has, and, where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employé is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting on all plaintiffs. Third, That, while the employer is bound to provide a safe place and safe machinery in which and with which the employé is to work, and while this is a positive duty resting upon him, and one which he may not avoid by turning it over to some employé, it is also true that there is no guaranty by the employer that the place and machinery shall be absolutely safe: Hough vs. Railway Company, 10 Otto, 213; Baltimore & Ohio Railroad vs. Baugh, 149 U. S. 368; Baltimore & Potomac Railroad vs. Mackey, 157 U. S. 72; Texas & Pacific Railway vs. Archibald, 170 U. S. 665. He is bound to take reasonable care and make reasonable effort, and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery.

Cotton vs. Wood, 8 C. B. N. S. 568. Common Pleas (1860).

The defendant was the owner of an omnibus which was operated between two points in London. On a dark evening in November, when the snow was falling fast, Mrs. Cotton and another woman undertook to cross a street, between the usual crossings, in front of this omnibus. They had passed before the omnibus when they were frightened by another vehicle bearing down upon them, and ran back. The omnibus was proceeding at a moderate rate on the right side of the street. The driver saw the women pass, and then turned his head to speak to the conductor, whence it resulted that he did not see the women run back, and was unaware of their danger until warned by the cries of by-standers. It was then too late to avoid a collision; and Mrs. Cotton was run over by the omnibus and killed. This suit was brought by Mr. Cotton under Lord Campbell's Act, and proceeded upon the allegation that the death of Mrs. Cotton was due to the negligence of the driver.

Held, that the facts stated did not warrant the inference that the omnibus had been managed negligently.

ERLE, C. J.: The plaintiff is not entitled to succeed unless there be affirmative proof of negligence on the part of the defendant or his servant; and there can be no such proof unless it be shown that there existed some duty owing from the defendant to the plaintiff, and that there has been a breach of that duty. Now I am utterly at loss to find any evidence of any breach of duty here. It is as much the duty of foot passengers attempting to cross a street or road to look out for vehicles as it is the duty of drivers to see that they do not run over foot-passengers. Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of proper care on the one side or the other, the party who founds his claim upon the imputation of negligence fails to establish his case. According to the evidence here, the plaintiff's wife, on a dark night, and in a snow-storm, proceeded slowly, accompanied by another female, to cross a crowded thoroughfare, whilst the defendant's omnibus was coming up on the right side of the road and at a moderate pace, and with abundant time, so far as I can judge, for the women to get safe across if nothing else had intervened; but, in turning back to avoid another vehicle, they returned and unfortunately met the danger. What, then, is the ground for imputing negligence and breach of duty to the defendant's servant? One of the plaintiff's witnesses stated that the driver was looking round at the time to speak to the conductor. That alone clearly would be no affirmative proof of negligence. * * * As far as the evidence goes, there appears to me to be just as much reason for saying that the plaintiff's wife came negligently in collision with the defendant's horses and omnibus as for saying that the collision was the result of negligence on the part of the defendant's servant. * * * In Toomey vs. The London, Brighton and South Coast Railway Company, 3 C. B. N. S. 146, . . . my Brother WILLIAMS . . . said:

"It is not enough to say that there was *some* evidence; for every person who has had any experience in courts of justice knows very well that a case of this sort could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence."

WILLIAMS, J.: I wish merely to add that there is another rule of the law of evidence, which is of the first importance, and is fully established in all the courts, viz. that where the evidence is equally consistent with either view—with the existence or non-existence of negligence—it is not competent to the judge to leave the matter to the jury. The party who affirms negligence has altogether failed to establish it. That is a rule which ought never to be lost sight of.

Hammack vs. White, 11 C. B. N. S. 588. Common Pleas (1862).

White bought at Tattersal's a horse with which he had been quite unacquainted, and on the next day rode the animal in Finsbury Circus, a much frequented thoroughfare. Hammack was walking on the foot-pavement in Finsbury Circus when White's horse became unmanageable, and despite White's endeavors to restrain him, swerved from the roadway to the pavement, ran against Hammack and caused him injuries which resulted in death. This action was brought by Hammack's widow under Lord Campbell's Act. At the trial the plaintiff proved the facts which have been stated, but did not show that the defendant had omitted to do anything which could have been done to prevent the accident. The only fact relied upon as evidence of negligence was that the defendant had ridden a strange horse into so crowded a place. The court held that there was no sufficient proof of negligence, and that it was proper to direct a verdict for the defendant.

ERLE, C. J.: I am of opinion that the plaintiff in a case of this sort is not entitled to have his case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant. The sort of negligence imputed here is, either that the defendant was unskillful in the management of the horse, or imprudent in taking a vicious animal, or one with whose propensities or temper he was not sufficiently acquainted, into a populous neighborhood. The evidence is, that the defendant was seen riding the horse at a slow pace, that the horse seemed restless and the defendant was holding the reins tightly, omitting nothing he could do to avoid the accident; but that the horse swerved from the roadway on to the pavement, where the deceased was walking, and knocked him down and injured him fatally. I can see nothing in this evidence to show that the defendant was unskillful as a rider or in the management of a horse. There is nothing which satisfies my mind affirmatively that the defendant was not quite capable of riding so as to justify him in being with his horse at the place in question. It appears that the defendant had bought the horse only the day before, and was for the first time trying his new purchase—using his horse in the way he intended to use it. It is said that the defendant was not justified in riding in that place a horse whose temper he was unacquainted with. But I am of opinion that a man is not to be charged with want of caution because he buys a horse without having had any previous experience of him. There must be horses without number ridden every day in London of whom the riders know nothing. A variety of circumstances will cause a horse to become restive. The mere fact of restiveness is not even *prima facie* evidence of negligence. Upon the whole, I see nothing which the learned Recorder could with propriety have left to the jury.

WILLIAMS, J.: It is said that *prima facie* the defendant was guilty of negligence because he was wrongfully on the foot-pavement. But the mere fact of his being on the foot-pavement is nothing unless he

was there voluntarily; and, to say the least, it is quite as consistent with the facts proved that he was there involuntarily as that he was there by his own mismanagement. I would refer to the principle alluded to by the LORD CHIEF JUSTICE in Cotton vs. Wood, 8 C. B. N. S. 568, which it is most important to keep in mind in all these cases, viz, that, where the evidence given is equally consistent with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury.

Res Ipsa Loquitur.

Byrne vs. Boadle, 2 H. & C. 722. Exchequer (1863).

THE BARREL CASE.

The defendant, a dealer in flour, had a warehouse fronting upon a street in Liverpool. The plaintiff, in passing this warehouse, was struck by a barrel of flour which came from above. The plaintiff could give no other account of the accident than this: "On approaching Scotland Place and defendant's shop, I lost all recollection. I felt no blow. I saw nothing to warn me of danger. I was taken home in a cab. * * * I saw the path clear. I did not see any cart opposite the defendant's shop." Two other witnesses called for the plaintiff could add nothing relative to the cause or the manner of his injury, except that both had seen him struck by a falling barrel. The defendant offered no evidence to account for the accident, but insisted that the plaintiff's case was insufficient in that it was not shown how the barrel came to fall and that there was no affirmative proof of negligence in the management of the barrel.

Held, that the plaintiff's evidence was sufficient to cast upon the defendant the burden of proving that the accident was not caused by his negligence, the circumstances of themselves affording a presumption that there had been negligence.

POLLOCK, C. B.: There are certain cases of which it may be said *res ipsa loquitur*, and this seems one of them. In some cases the courts have held that the mere fact of the accident having occurred is evidence of negligence, as, for instance, in railway collisions.

BRAMWELL, B.: No doubt, the presumption of negligence is not raised in every case of injury from accident, but in some it is. We must judge of the facts in a reasonable way; and, regarding them in that light, we know that these accidents do not take place without a cause, and in general that cause is negligence. * * * Looking at the

matter in a reasonable way, it comes to this: an injury is done to the plaintiff, who has no means of knowing whether it was the result of negligence; the defendant, who knows how it was caused, does not think fit to tell the jury.

POLLOCK, C. B.: The learned counsel was quite right in saying that there are many accidents from which no presumption of negligence can arise; but I think it would be wrong to lay it down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out; and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence; and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* proof of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are responsible, and, if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case, upon the evidence comes to this: a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the control of it; and in my opinion the fact of its falling is *prima facie* evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence; but, if there are any facts inconsistent with negligence, it is for the defendant to prove them.

Inland and Seaboard Coasting Company vs. Tolson, 139 U. S. 551. Supreme Court of the United States (1891).

Tolson was the owner of a wharf in the Potomac River, on which river the Coasting Company operated a number of steamboats. On one occasion Tolson, desiring to send some small articles to Washington, hailed one of the company's steamers. The boat backed in toward the wharf, on the outer edge of which stood Tolson, intending to hand his goods to one of the crew. The boat struck the wharf with such force as to tear up some of the planks, whereby Tolson's foot was crushed. In this action

brought by him against the company, two grounds of defence were insisted upon:

1. That the plaintiff, in proving only the facts just stated, had offered no affirmative proof of negligence in the management of the boat; and,

2. That, granting that the boat was negligently managed, Tolson was guilty of contributory negligence in placing himself in a position of danger.

On the former point, the trial court instructed the jury, thus:

"If the jury believe from the evidence that the wharf in question was an ordinarily strong and good one, and suitable for the purpose for which it was constructed, and that, in making the landing in question, the boat was thrown against the wharf with such force as to tear up some of the planks or boards of the flooring, this would be *prima facie* evidence of negligence on the part of the agents of defendant under the circumstances in making such landing, and would justify the jury in so finding, unless upon the whole evidence such *prima facie* evidence is rebutted."

The Supreme Court approved this instruction, concerning which it was observed by

GRAY, J.: The whole effect of the instruction in question, as applied to the case before the jury, was that, if the steamboat, on a calm day and in smooth water, was thrown with such force against a wharf properly built, as to tear up some of the planks of the flooring, this would be *prima facie* evidence of negligence on the part of the defendant's agents in making the landing, unless upon the whole evidence in the case this *prima facie* evidence was rebutted. As such damage to a wharf is not ordinarily done by a steamboat under control of her officers and carefully managed by them, evidence that such damage was done in this case was *prima facie*, and, if unexplained, sufficient, evidence of negligence on their part, and the jury might properly be so instructed [citing cases].

[On the question of contributory negligence, the trial court gave this instruction to the jury:]

"There is another qualification of this rule of negligence which it is proper I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to

have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributing negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence." This instruction also was approved by the Supreme Court, with this comment:

The qualification of the general rule, as thus stated, is supported by decisions of high authority, and was applicable to the case on trial [citing cases].

The plaintiff obtained a judgment, which was affirmed.

Christie vs. Griggs, 2 Campbell, 79. Nisi Prius (1809).

The defendant operated a stage-coach, in which the plaintiff, a mariner, took passage, and which broke down in the journey, whereby the plaintiff was injured. The declaration was in two counts, one of which alleged that the accident was occasioned by the negligence of the driver, and the other attributed the breakdown to the insufficiency of the coach. The evidence showed that, in crossing a depression in the road, an axle-tree had snapped, and the plaintiff had been thrown from the top of the carriage. The plaintiff then rested his case; and it was contended for the defendant that the proof was insufficient, but that the plaintiff was bound to give further evidence that either the driver had been negligent or the vehicle defective.

Sir James Mansfield, C. J.: I think the plaintiff has made a *prima facie* case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skillful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself, and how do they know whether the coach was well built or whether the coachman drove skillfully? In many other cases of this sort it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption if it be unfounded; and it is now incumbent upon the defendant to make out that the damage in this case arose from what the law considers a mere accident.

The defendant then called several witnesses, who swore that the axle-tree had been examined a few days before it broke, without any flaw being discovered in it; and that, when the accident happened, the coachman, a very skillful driver, was driving in the usual track and at a moderate pace.

SIR JAMES MANSFIELD said, as the driver had been cleared of everything like negligence, the question for the jury would be as to the sufficiency of the coach. If the axle-tree was sound, as far as the human eye could discover, the defendant was not liable. There was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of passengers. His undertaking as to them went no further than this, that, so far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff had no remedy for the misfortune he had encountered. *Verdict for the defendant.*

Sweeney vs. Erving, 35 App. D. C. 57 (1910). Affirmed. 228 U. S. 233.

The defendant was a physician and a specialist in the use of X-rays. Mrs. Sweeney applied to him for a diagnosis to be made by the use of those rays, and, after several exposures, found that her skin had been badly burned, as the result, so it was alleged, of the defendant's treatment. She sued Dr. Erving, charging him with negligence and unskillfulness in the management of the rays. At the trial she proved that the defendant had employed the rays upon her and that she had suffered injuries which were attributable to that kind of treatment. The defendant proved that he was well qualified by study and experience to manage X-rays and that his manner of treating the plaintiff was in accordance with the practice which was usual and sanctioned by authority in such cases. The verdict was for the defendant. The plaintiff appealed to the Court of Appeals of the District of Columbia, and afterwards obtained a writ of error from the Supreme Court of the United States, her contention being that she had sufficiently established her allegation of negligence by the mere proof of the injuries sustained by her; that is to say, that it was a case for the application of *res ipsa loquitur.* Both of the appellate courts held against her, the respective grounds of decision being stated by ROBB, J., in the Court of Appeals, and by PITNEY, J., in the Supreme Court.

ROBB, J.: The court declined to rule that the fact, that the plaintiff was burned in the course of the operation of the X-ray apparatus by the defendant, if the jury should find that fact to be established, was of itself evidence of negligence on the part of the defendant. * * *

It is well settled that the degree of skill and learning which a physician or surgeon is required to possess and exercise is that degree of skill and learning ordinarily possessed and exercised by members of his profession in the same line of practice in that locality. * *

Generally speaking, no inference of negligence can be drawn from the result of the treatment of a physician or surgeon. In the absence of special contract, they are not insurers, and there must be evidence of negligence by witnesses qualified to testify: Wood vs. Barker, 49 Mich. 295; Piles vs. Hughes, 10 Iowa, 579. "If the maxim *res ipsa loquitur* were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous to practice the healing art, for they would have to assume financial liability for nearly all 'the ills that flesh is heir to' ": Ewing vs. Goode, 78 Fed. 442.

There are exceptional cases where the result of an operation performed, if unexplained, may warrant an inference of negligence. Thus, evidence showing that after a broken ankle was reset, the ankle was crooked and the ankle-joint stiff, tends to prove negligence on the part of the physician in setting the ankle, which evidence should be submitted to the jury: Hickerson vs. Neely, 21 Ky. L. Rep. 1257; 54 S. W. 842. The fact that a physician attending a woman at childbirth failed to remove all the placenta justifies, if unexplained, a conclusion of negligence: Moratzky vs. Wirth, 67 Minn. 46; 69 N. W. 480.

The result of the above general rule is that, in an action for malpractice, the burden is always on the one alleging it; and, even in exceptional cases, where a *prima facie* case is made out by proof of the operation and resultant injury, "the doctrine of *res ipsa loquitur* does not relieve the plaintiff of the burden imposed upon him of establishing has case by a preponderance of the evidence": Sullivan vs. Capital Traction Co., 34 App. D. C. 358. * * * In Wilkins vs. Brock [81 Vt. 332], the court said: "The defendant Brock's motion for a verdict should have been sustained; for, to warrant the finding of malpractice, it was necessary to have medical expert testimony to show it, and there was none: but, on the contrary, there was such testimony tending to show that the treatment was proper and according to the principles and practice of osteopathy. It was not enough to show merely that the treatment was injurious, but it was necessary to go further and to show by competent witnesses that the requisite care and skill was not exercised in giving it; for that was the only question, according to the plaintiff's brief, and that was not done. Such is the doctrine of all the cases."

Here there was no testimony that the instrument used by the defendant was out of repair, that the exposures were of too frequent periods or of too great duration. Neither is there any evidence of lack of skill. On the contrary, the defendant testified to his long experience in the use of such a machine, to the condition of the machine, and to the exact character of its use upon the plaintiff. In addition to this testimony, he introduced six physicians skilled in that particular branch of practice, whose testimony, without exception, negatived the charge of negli-

gence. In that state of the case, the plaintiff received all, and possibly more than, the consideration to which she was entitled by being permitted to go to the jury at all.

PITNEY, J.: The contention in behalf of the plaintiff is that, since the injury to the plaintiff was caused by an agency in the possession of the defendant and under his exclusive management and control, there arises from this, coupled with the fact that personal injury resulted therefrom to the plaintiff, a presumption of negligence on defendant's part, upon the doctrine of *res ipsa loquitur*, and that the burden is thereby imposed upon him to overcome that presumption by a preponderance of evidence sufficient to satisfy the jury that the injury was not caused by negligence on his part. As will be seen, this contention includes two propositions: the first, that the case is a proper one for the application of the doctrine *res ipsa loquitur;* the second, that the application of this doctrine relieves the plaintiff from the burden of proof and imposes that burden upon the defendant. * * *

In the view we take of the matter, it is not necessary to pass upon the question whether the evidence presented a case for the application of the rule *res ipsa loquitur;* for the reason that, in cases where that rule does apply, it has not the effect of shifting the burden of proof.

The general rule in actions of negligence is that the mere proof of an "accident" (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that, if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases it is said *res ipsa loquitur*—the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.

The doctrine has been so often invoked to sustain a refusal by trial courts to nonsuit the plaintiff or direct a verdict in favor of the defendant, that the application of the rule, where it does apply, in raising a question for the jury, and thus making it incumbent upon the defendant to adduce proof if he desires to do so, has sometimes been erroneously confused with the question of the burden of proof. But in the requested instruction now under consideration the matter was presented in no equivocal form. Plaintiff's insistence was not merely that the evidence of the occurrence of the injury under the circumstances was evidential of negligence on defendant's part, so as to make it incumbent upon him to present his proofs; the contention was that it made it necessary for him to prove by a preponderance of the evidence that there was an absence of negligence on his part. * * *

In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such inference; that they furnish circumstantial evidence of negligence

where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defence. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff.

Sullivan vs. Capital Traction Company, 34 App. D. C. 358.

Sullivan, a cripple, was riding on the platform of a car operated by the defendant company when the car, in rounding a curve, lurched, whereby Sullivan was thrown to the track and sustained injuries, for which he brought this action. At the trial the plaintiff was unable to prove any other negligence in the operation of the car than such as could be inferred from the facts just stated; and his contention was that it was a case for the application of the maxim *res ipsa loquitur*, the accident itself bespeaking negligence on the part of the carrier. The trial court declined so to view the case; and, because Sullivan was unable to prove negligence by affirmative evidence, directed a verdict for the defendant.

Held, on appeal, that the instruction given was correct.

VAN ORSDEL, J.: The rule that the mere happening of an accident to a passenger is sufficient to create an inference of negligence on the part of the carrier is limited to certain well-defined cases, and, we think, does not operate in any case to impose upon the carrier the burden of establishing by a preponderance of the evidence that it was free from the charge of negligence. The burden is always upon the plaintiff to make out his case. It is true that where, by the failure of appliances of transportation, or by collision, an accident happens whereby a passenger is injured, and the circumstances of the accident are peculiarly within the knowledge of the carrier, such passenger may, in his declaration and proof, content himself with establishing his right to recover, by proving that he was a passenger and sustained the injury while such. This is sufficient under such circumstances to establish a *prima facie* case, which, in the absence of any explanation on the part of the defendant, would entitle the plaintiff to recover; but even this does not relieve the plaintiff from establishing his case by a preponderance of the evidence. It merely raises an inference of negligence, which calls for rebuttal or explanation on the part of the defendant, and which, in the absence of such explanation, will authorize the plaintiff to recover. * * *

This, we think, is not only the established law of this jurisdiction, but of the courts generally. In Metropolitan Railroad vs. Snashall, 3 App. D. C. 420, a passenger was injured while riding on one of the defendant's horse cars. The court said: "Under the circumstances of this accident, there having been no derailment, no collision, no fail-

ure of the means or appliances for transportation, no presumption of negligence on the part of the carrier could be indulged from the mere happening of the accident itself. (Western Transp. Co. vs. Downer, 11 Wall. 129.) Nor is it to be presumed from the mere fact of plaintiff's fall from the car that she did not exercise ordinary care. The existence of negligence on the one hand, and of contributory negligence on the other, is to be established by reasonable inference from the facts and circumstances surrounding the accident and illustrating its cause, and not from the mere happening thereof."

In Harbison vs. Metropolitan R. Co., 9 App. D. C. 60, the passenger was injured while walking along the footboard, toward the rear of the car, looking for a vacant seat. It was insisted on the part of the plaintiff that the maxim of *res ipsa loquitur* applied to the facts stated, and that, being a passenger on the car, a presumption arose from the happening of the accident, which defendant was required to rebut. In the opinion, the court quoted with approval from the case of Weaver vs. Baltimore & Ohio Railroad Co., 3 App. D. C. 436, as follows: "The burden is always upon the plaintiff to make out his case. Where negligence furnishes the cause of action, it must be proved by the party alleging it. There are some cases in which it has been said that the law presumes negligence on the part of the carrier from the mere happening of an accident to a passenger. This is not a strictly accurate statement of the law. The most that can properly be said is that, when an injury occurs through some accident to the means of transportation which is under the management of the carrier's employees and which, if they exercise proper care, cannot ordinarily happen, it affords reasonable evidence, in the absence of explanation, from which negligence may be inferred. . . . In this case there was no derailment of the car, no injury to it or to the track, no accident of any kind affecting it, or that could have affected any passenger inside the cars. There is no legally established fact upon which to found the presumption or inference of negligence on the part of the defendant. The sole foundation for the inference of negligence exists in the fact that the intestate was instantly killed by coming in contact with the post of a bridge which is not as wide as is now customary in the construction of new bridges."

Our attention has been called to the language of CHIEF JUSTICE ALVEY in City & Suburban R. Co. vs. Svedborg, 20 App. D. C. 543, in relation to the burden of proof on the defendant, but we cannot find that the learned CHIEF JUSTICE went further than to hold that the burden cast upon the railroad company was that of "explaining the circumstances of the accident so as to relieve itself from liability."

Contributory Negligence.

Baltimore and Potomac Railroad Co. vs. Jones, 95 U. S. 439. Supreme Court of the United States (1877).

Jones was a day laborer in a section gang, working upon the roadbed of the railroad. The men had been carried to and from

their work upon a locomotive; but, as this was dangerous, a box car was provided, and the men notified that they must ride in it instead of upon the engine. Several times before the accident Jones had been warned and forbidden to ride upon the locomotive. One evening in bringing the men back from their work, the construction train ran into some cars which had been left standing in a tunnel. Jones was riding upon the pilot of the engine and was severely injured. He brought this action upon the theory that the company had been guilty of negligence in permitting the cars to stand unguarded in the tunnel. *Held,* that he could not maintain his action, as his contributory negligence was the proximate cause of the injury.

SWAYNE, J.: * * * Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is the rule of the civil and of the common law. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or, (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence, or want of ordinary care and caution, that, but for such negligence or want of care and caution on his part, the misfortune would not have happened. In the former case, the plaintiff is entitled to recover; in the latter, he is not. Davies vs. Mann, 10 M. & W. 546. Tuff vs. Warman, 5 C. B. (N. S.) 573. It remains to apply these tests to the case before us. The facts with respect to the cars left in the tunnel are not fully disclosed in the record. * * * For the purposes of this case, we assume that the defendant was guilty of negligence. The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car. He should have taken his place there. * * * The company, though bound to a high degree of care, did not insure his safety. He was not an infant or *non compos.* The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box-car, where he should have been, were uninjured. He would have escaped also, if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. The case is thus clearly

brought within the second of the predicates of mutual negligence we have laid down. The plaintiff is not entitled to recover.

Maryland Steel Company vs. Marney, 88 Md. 482 (1898).

Marney was employed by the defendant company in its steel mill, and was in charge of the cupola, a large vessel containing molten metal. In the course of the work this metal was, from time to time, drawn from the cupola through a spout in the side of the vessel; and when a sufficient quantity of the material had been drawn, the flow was stopped by plugging the vent with a cone of wet clay, the workman who performed that duty being called a tapper. The regular tapper being absent, the superintendent assigned to his place one Felix, a person whom the superintendent knew to be incompetent for such work, and to be also negligent and indifferent to the gravity of the duty. In the course of the day, Felix tapped the vent so unskillfully that the metal continued to flow. Had Marney remained where he was, he would have been in no danger from the escaping liquor, but the molten material would have fallen upon a number of the workmen who were at work under the cupola. Marney, therefore, being himself an expert tapper, rushed to repair the defective plugging; but, before he could check the flow, the metal burst out in larger volume, striking Marney and causing him severe and permanent injury.

Marney brought action upon the theory that the company was guilty of a breach of duty in exposing him to the negligence of an incompetent fellow-servant. The company defended on the ground that Marney's injuries were attributable to his own contributory negligence in voluntarily exposing himself to a peril which he might have avoided by standing still.

Held (1), that the company was derelict in its duty toward the plaintiff by assigning to him a fellow-servant known to be incompetent; and,

(2) that the plaintiff was not guilty of contributory negligence in taking a risk for the sake of saving life.

PEARCE, J.: It was also contended at the trial below that as the plaintiff, by his own admission, voluntarily left a position of safety and exposed himself to peril, that he was thus guilty of contributory negligence which must defeat his recovery * * * The general principles of law upon the application of which this case must depend are well established, but there is involved one question which has never been passed upon by this Court, namely, whether one who voluntarily incurs peril caused by the negligence of another, in order to save the life of one imperilled by the same negligence, is debarred from recovery upon the ground of his own contributory negligence. * * * In all cases where the relation of master and servant is created by a mere agreement that the servant is to labor for the master at a certain rate of compensation, there arise by implication certain reciprocal rights and obligations on the part of each, which the law recognizes as fully as if expressed in the agreement, * * * First, that he will provide suitable

means and appliances to enable the servant to do his work as safely as the hazards incident to his employment will permit.

Second, that he will provide a suitable and reasonably safe place for the doing of the work to be performed by the servant.

Third, that he will provide, when required by the nature of the work, other servants reasonably skillful and competent for the performance of their particular work, so that the servant may not be exposed to unnecessary risk or peril from unskillful or incompetent fellow-servants.

In the performance of these and all other similar duties the master is not a guarantor against the negligence of his servants, and is bound only to the exercise of reasonable and ordinary care. Every servant entering into the employment of a master takes upon himself the risk of injury from the negligence of his fellow-servants, and for such negligence the master cannot be held liable, unless he himself has been guilty of negligence in the selection of the servant whose carelessness caused the accident, or unless, knowing his incompetency, or having sufficient opportunity to know it and failing to discover it, he has retained the negligent employee in his service. * * * The evidence of the gross incompetency of Felix as tapper, as well as the full knowledge by the defendant of such incompetency, before his employment on the day of the accident and on that day before the accident, is undisputed and overwhelming. * * * These extracts from the testimony establish beyond all question the gross incompetency of Felix (the tapper) for his work, and the full and continuous knowledge of this incompetency by the defendant, thus charging it with flagrant negligence in his selection for such work.

But it still remains to be shown that the accident was the direct result of the incompetency of Felix, * * * It was strenuously contended that the cause of the accident was not the negligence of defendant in supplying an incompetent fellow-workman nor the negligence of Felix in not properly securing the tap hole, but that it was the action of Marney himself in attempting to prevent the consequences of the negligence of Felix by stopping the tap hole himself; and this requires some consideration of the doctrine of proximate and remote cause. Bailey in his Master & Servant, page 418, says: "It is perhaps well to call attention to the fact that proximate cause does not mean the direct cause in point of time, but may mean the nearest by relation; that remote cause does not mean remote in point of time, but merely in its connection with the primary cause" * * * The case of Gibney vs. The State, 137 N. Y. 1, is an application of the principles. Plaintiff, with her husband and infant son, were crossing a bridge over the Erie Canal; the child fell through an opening in the railing of the bridge, which was left unguarded, into the canal: the father plunged into the canal to rescue the child and both were drowned. It was held "that while the immediate cause of the peril to which the father naturally and instinctively exposed himself was the peril of the child, the cause of the peril in both cases might be attributed to the culpable negligence of the State in leaving the bridge in a dangerous condition." * * * It only remains therefore to consider whether plaintiff's interposition,

without actual negligence, in order to save life, constitutes negligence *per se*, and we are of opinion that it does not. * * * Beach, in his work on Contributory Negligence, says: "When one risks his life, or places himself in a position of great danger in an effort to save the life of another, or to protect another who is exposed to a sudden peril, or in danger of great bodily harm, such exposure and risk for such purpose is not negligence." In Eckert vs. L. I. R. Co., 43 N. Y. 502, where the plaintiff's intestate, seeing a little child on the track of the defendant's railroad and a train swiftly approaching, so that the child would be almost instantly crushed, in the sudden exigency of the occasion, rushed to save the child, and though succeeding in that, lost his own life, held that he was not guilty of negligence. JUDGE GROVER said: "It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If from the appearances he believed that he could, it was not negligence to make an effort to do so, although believing that he might fail and receive an injury himself. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons."

Lynch vs. Nurdin, 1 Q. B. 29 (1841).

The defendant was a dealer in eggs, who in his business used a delivery wagon driven by one of his employés. The driver, whilst delivering eggs in a customer's house, left the horse and wagon standing loose in the street for about half an hour. A number of small boys, including the plaintiff, who was six years of age, amused themselves by climbing upon the wagon. One of the boys caused the horse to start as the Lynch boy was climbing into the vehicle; and the latter was thrown to the ground and injured.

Held, that the defendant was liable, notwithstanding that the boy was guilty of what, in an older person, would have been contributory negligence.

LORD DENMAN, C. J.: It is urged that the mischief was not produced by the mere negligence of the servant, as asserted in the declaration, but at most by that negligence in combination with two other active causes, the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart and so committing a trespass upon the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell at any length. For, if I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifi-

ably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first. * * * This might possibly be assumed as clear in principle; but there is also the authority of the present Chief Justice of the Common Pleas in its support: Illidge vs. Goodwin, 5 C. & P. 190.

But in the present case an additional fact appears. The plaintiff himself has done wrong; he had no right to enter the cart, and, abstaining from doing so, would have escaped the mischief. Certainly he was a coöperating cause of his own misfortune, by doing an unlawful act; and the question arises, whether that fact alone must deprive the child of his remedy.

The legal proposition, that one who has by his own negligence contributed to the injury of which he complains cannot maintain an action in respect of it, has received some qualifications. Indeed, LORD ELLENBOROUGH'S doctrine in Butterfield vs. Forrester, 11 East. 60, which has been generally adopted since, would not set up the want of a superior degree of skill or care as a bar to the claim for redress: ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation; and this would evidently be very small indeed in so young a child. But this case presents more than the want of care; we find in it the positive misconduct of the plaintiff an active instrument toward the effect. We have here express authorities for our guidance. * * *

In Ilott vs. Wilkes, 3 B. & Ald. 304, a decision which excited great attention both in Westminster Hall and beyond it, this court indeed held that a trespasser in a wood, where he well knew spring-guns to be placed, could not sue for the injury received by him from the explosion of one of them. But LORD TENTERDEN and his three brethren cautiously and repeatedly declared that their opinion was founded on the plaintiff's knowing of the danger and voluntarily incurring it. BEST, J., who was supposed to carry to the greatest extent the right of protecting property against invaders by placing dangerous instruments, took infinite pains, when Chief Justice of the Common Pleas, to explain that his opinion in Ilott vs. Wilkes rested exclusively on the notice. In Bird vs. Holbrook, 4 Bing. 628, his expressions are most remarkable. And so far is his Lordship from avowing the doctrine, that the plaintiff's concurrence in producing the evil debars him of his remedy, that he considers Ilott vs. Wilkes an authority in favor of the action. He also expresses an inclination to agree with the two learned judges who held the action maintainable in Deane vs. Clayton,* 7 Taunton, 489.

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*In Deane vs. Clayton (1817), the defendant had set in his wood a number of dogspears, so fixed as to wound a dog which in the pursuit of small game might run upon one of them. The plaintiff was lawfully hunting upon an adjoining tract when his dog started a hare upon that tract and pursued it upon the defendant's land, where the dog was killed by one of the spears. The defendant had posted notices to the effect that traps, spring-guns and dogspikes were set in his land. In Ilott vs. Wilkes (1820), the defendant had set spring-guns upon his premises, of which fact he had given notice, and the plaintiff knew of the notice. In going upon the land for the purpose of gathering nuts, the plaintiff was injured by one of the guns. In Bird

There the plaintiff's dog had been killed by a spike placed on the defendant's land for the protection of his preserves, while in pursuit of a hare. PARK and BURROUGHS, Js., gave judgment in favor of the plaintiff; GIBBS, C. J., and DALLAS. J., for the defendant. The present argument does not require any particular discussion of that case, because Bird vs. Holbrook is decisive authority against the general proposition, that misconduct, even willful and culpable misconduct, must necessarily exclude the plaintiff who is guilty of it from the right to sue. I remember being present at a trial in Warwick, before LORD CHIEF BARON RICHARDS, where the same law prevailed. The case is mentioned in Bird vs. Holbrook: a boy, having received serious injury from a spring-gun placed in a garden where he was trespassing, recovered a verdict for £120 damages, which was much considered and never disturbed.

A distinction may here be taken between the willful act done by the defendant in those cases in deliberately planting a dangerous weapon in his ground with the design of deterring trespassers, and the mere negligence of the defendant's servant in leaving his cart in the open street. But between willful mischief and gross negligence the boundary line is hard to trace: I should rather say impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice. It is then a matter strictly within the province of a jury deciding on the circumstances of each case. They would naturally inquire whether the horse was vicious or steady; whether the occasion required the servant to be so long absent from his charge, and whether in that case no assistance could have been procured to watch the horse; whether the street was at that hour likely to be clear or thronged with a noisy multitude: especially whether large parties of young children might be reasonably expected to resort to the spot. If this last mentioned fact were probable, it would be hard to say that a case of gross negligence was not fully established.

But the question remains, can the plaintiff then, consistently with the authorities, maintain his action, having been at least equally at fault? The answer is that, supposing that fact ascertained by the jury, but to this extent, that he merely indulged the natural instinct of a child in amusing himself with the empty cart and the deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having

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vs. Holbrook (1828), the defendant had set a spring-gun for the protection of his tulip-bed, but had refrained from giving notice of the fact. The plaintiff, having climbed over the defendant's wall in pursuit of a pea fowl which had escaped from the adjoining premises, was injured by the gun. It was held that, notwithstanding he was a trespasser, he was entitled to recover. The decision in Ilott vs. Wilkes was the subject of severe criticism by the Rev. Sydney Smith in two articles published in the Edinburgh Review in 1821. An act of Parliament passed in 1827 made the setting of spring-guns, except for the protection of a dwelling house in the night-time, a criminal offence. In Jordin vs. Crump, 8 M. & W. 782 (1841), upon facts very similar to those in Deane vs. Clayton, the defendant was held not liable for the loss of the plaintiff's dog which was killed by a dogspear set in the defendant's wood, the dog having left a footway passing through the wood in pursuit of a rabbit.

tempted the child, he ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown those qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it.

Sioux City and Pacific Railroad Company vs. Stout, 17 Wallace, 657 (1873).

THE TURNTABLE CASE.

The plaintiff, a boy six years of age, lived with his parents in a village of about one hundred and fifty inhabitants on the line of the defendant's railway. About a quarter of a mile from the company's station in this village, and about three-quarters of a mile from the plaintiff's home, the company had a turntable, which was on a piece of unenclosed land belonging to the company. The small boys of the village had, on two or three occasions, been seen playing on the turntable by divers persons in the employ of the company; but, as these persons were charged with no duties respecting the turntable, they had not felt called upon to report to the defendant's officers the practice of the boys. There had originally been upon the turntable a latch, consisting of a bolt of iron weighing eight or ten pounds, which turned on a hinge and could be dropped into a socket, with the effect of holding the turntable in one position so long as the latch was not lifted. This latch had been broken and was not repaired.

The plaintiff on a certain day, without the knowledge of his parents, in company with two other boys three or four years older, went to the railway station in the village "with no definite purpose in view." It was then proposed that they go to play upon the turntable, an amusement in which the older boys had, and the plaintiff had not, previously indulged; and the three boys proceeded to visit that attractive toy and to set it in motion. In the course of the adventure, the little Stout boy suffered his foot to be caught between the end of the revolving rail and the end of the fixed rail, whereby he was permanently crippled.

In an action brought on account of this accident, the jury were instructed:

"That, to maintain the action, it must appear by the evidence that the turntable, in the condition, situation and place where it then was, was a dangerous machine, one which, if unguarded or unlocked, would be likely to cause injury to children; that, if in its construction and the manner in which it was left, it was not dangerous in its nature, the defendants were not liable for negligence; that they were further to consider whether, situated as it was on the defendant's property in a small town, somewhat remote from habitations, there was negligence in not anticipating that injury might occur if it was left unlocked or unguarded; that, if they did not have reason to anticipate that children would be likely to resort to it, or that they would be likely to be injured if they did resort to it, then there was no negligence."

Under these instructions the jury gave the plaintiff a verdict for $7,500; and the judgment entered therein was affirmed in the Supreme Court of the United States.

HUNT, J.: It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult, that, to entitle him to recover damages for an injury to himself resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case. * * *

A reference to some of the authorities on the last suggestion may, however, be useful.

In the well-known case of Lynch vs. Nurdin [1 Q. B. 29], the child was clearly a trespasser in climbing upon the cart, but was allowed to recover.

In Birge vs. Gardiner [10 Conn. 507], the same judgment was given, and the same principle was laid down. In most of the actions, indeed, brought to recover for injuries to children, the position of the child was that of a technical trespasser.

In Daly vs. Norwich and Worcester Railroad Company [26 Conn. 591], it said the fact, that a person was trespassing at the time, is no excuse, unless he thereby invited the act or his negligent conduct contributed to it.

In Bird vs. Holbrook [4 Bing. 628], the plaintiff was injured by the spring-guns set in the defendant's grounds, and, although the plaintiff was a trespasser, the defendant was held liable.

There are no doubt cases in which the contrary rule is laid down. But we conceive the rule to be this: that, while a railway company is

not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts. * * *

That the turntable was a dangerous machine, which would be likely to cause injury to children who resorted to it, might fairly be inferred from the injury which actually occurred to the plaintiff. There was the same liability to injury to him, and no greater, that existed with reference to all children. When the jury learned from the evidence that he had suffered a serious injury, by his foot being caught between the fixed rail of the roadbed and the turning rail of the table, they were justified in believing that there was a probability of the occurrence of such accidents. So, in looking at the remoteness of the machine from inhabited dwellings, when it was proved to the jury that several boys from the hamlet were at play there on this occasion, and that they had been playing on the turntable on other occasions, and within the observation and to the knowledge of the employés of the defendant, the jury were justified in believing that children would probably resort to it, and that the defendant should have anticipated that such would be the case.

As it was in fact on this occasion, so it was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. * * * The jury may well have believed that, if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty would have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff. The evidence is not strong and the negligence is slight, but we are not able to say that there is not evidence sufficient to sustain the verdict. We are not called upon to weigh, to measure, to balance, the evidence, to ascertain how we should have decided if acting as jurors. The charge was in all respects sound and judicious, and, there being sufficient evidence to sustain the finding, we are not authorized to disturb it.

Union Pacific Railway Company vs. McDonald, 152 U. S. 262 (1894).

THE SLACK-PIT CASE.

The railway company operated a coal mine, which was situate a few hundred feet from the company's station in the village of

Erie, Colorado, and near the line of the company's road. In working the mine the company's servants had deposited a great quantity of coal slack in a trench which extended along one side of the track; and this slack had taken fire below the surface from spontaneous combustion, so that it consisted substantially of a deep bed of burning coal which was covered by a few inches of ashes. Except when there was rain, snow or wind, to cause the emission of smoke, nothing was visible to indicate the existence of combustion beneath the ashes. A path, about eighteen inches wide, skirted the rim of the trench and led from the station to the shaft of the mine; the path was rough, not very distinctly marked, and slanted slightly toward the trench. The coal had been burning for two or three years, and the fire, on one occasion, had been within twenty feet of the station, which was not far from the most populous part of the town. Cattle had occasionally fallen into the slack-pit and been hurt. The company had permitted all who chose, including the children of the village, to visit the mine, and all who did so used the path along the edge of the trench.

McDonald, a boy twelve years of age, arrived with his mother, at Erie one morning, and in the afternoon of the same day he started, with his mother's permission and in the company of a boy living in the town, to go to the coal mine. Shortly after he reached the shaft, five or six large boys, employed in the mine, who were very dirty and had lamps on their hats, emerged from the coal pit and started toward McDonald, crying, "Let's grease him," and "Let's burn him." The small boy, being much frightened, ran toward the village, taking the narrow path by the slack-pit, and, in attempting to pass some persons whom he met, slipped and fell into the pit, whereby he was seriously burned and permanently injured.

In an action brought by the boy against the company, it was held that the latter was guilty of negligence in suffering the slack-pit to burn where it was, the decision proceeding for the most part upon the youth of the plaintiff, although the principles laid down would seem to be available, to some extent at least, in favor of an adult who might be injured in like circumstances.

HARLAN, J.: We adhere to the principles announced in Railroad Co. vs. Stout, *supra*. Applied to the case now before us, they require us to hold that the defendant was guilty of negligence in leaving unguarded the slack pile made by it in the vicinity of its depot building. It could have forbidden all persons from coming to its coal mine for purposes merely of curiosity and pleasure. On the contrary, it permitted all, without regard to age, to visit the mine and witness its operation. It knew that the usual approach to the mine was by a narrow path skirting its slack pit, close to the depot building, at which the people of the village, old and young, would often assemble. It knew that children were in the habit of frequenting that locality and playing around the shaft-house in the immediate vicinity of the slack pit. The slightest regard to the safety of these children would have suggested that they were in danger from being so near a pit, beneath the surface of which was concealed (except when snow, wind or rain prevailed) a mass of burning coals into which a child might accidentally fall and be burned to death. Under all the circumstances, the railroad company cannot be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser, to whom it owed no duty, or for whose protection it was under no obligation to make provision.

In Townsend vs. Wathen, 9 East. 277, 281. it was held that, if a man place dangerous traps, baited with flesh, in his own ground, so near to a highway or to the premises of another that dogs passing along the highway or kept in his neighbor's premises would probably be attracted by their instinct into the traps, and in consequence of such act his neighbor's dogs be so attracted and thereby injured, an action on the case would lie. "What difference," said LORD ELLENBOROUGH, C. J., "is there in reason between drawing the animal into the trap by means of his instinct which he cannot resist and putting him there by manual force?" What difference, in reason, we may observe in this case, is there between an express license to the children of this village to visit the defendant's coal mine, in the vicinity of its slack pile, and an implied license resulting from the habit of the defendant to permit them, without objection or warning, to do so at will, for purposes of curiosity or pleasure? * * *

Nor is there any force in the suggestion that the plaintiff was negligent in falling into the burning slack. The conduct of the persons who came out of the coal pit, with lamps upon their heads and with dirty faces, yelling "Let's grease him." "Let's burn him," frightened the lad, and caused him to run in the direction of the town where his mother was staying. He ran towards the only path that was open to him, and made such efforts as he could to escape those who threatened to harm him. His falling into the slack heap was accidental, and in no proper or just sense the result of negligence. The question of negligence upon the part of an infant must be determined with reference to his age and to the situation in which, at the time of the injury, the circumstances placed him. The authorities cited—indeed all the adjudged cases—agree, as declared by the Court of Appeals of New York, that,

in applying the rule that a person who seeks to recover for a personal injury, sustained by another's negligence, must not himself be guilty of negligence that substantially contributes to the result, the law discriminates between children and adults, the feeble and the strong, and only requires of each the exercise of that degree of care to be reasonably expected in view of his age and condition: Reynolds vs. N. Y. C., &c., Railroad, 58 N. Y. 248. And so, as declared by the same court, persons in sudden emergencies, and called to act under peculiar circumstances, are not held to the exercise of the same degree of caution as in other cases: Thurber vs. Harlem Bridge, &c., Railroad, 60 N. Y. 326. Even in the case of an employé of a railroad company, claiming to have been injured as the result of the company's negligence, this court has said that, in determining whether he has recklessly exposed himself to peril, or failed to exercise the care for his personal safety, that might reasonably be expected, regard must always be had to the exigencies of his position, indeed, to all the circumstances of the particular occasion: Kane vs. Northern Central Railroad Company, 128 U. S. 91.

Last Clear Chance.

Butterfield vs. Forrester, 11 East, 60. King's Bench (1809).

Forrester, being engaged in repairing his house, which was in the outskirts of Derby, had stretched a pole over a part of the road before the house. The plaintiff left a public house in Derby at eight o'clock in the evening in the month of August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at a distance of one hundred yards; and a witness of the accident said that, if the plaintiff had not been riding very hard, he might have observed and avoided the pole. Butterfield was, however, riding violently, and so failed to see the pole in time to check his horse, and rode against it and was hurt. At the trial, the jury were told that, if they were satisfied that the plaintiff was riding "extremely hard and without ordinary care," they should find for the defendant, which they did. And the direction was held to be correct.

BAYLEY, J.: The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of Derby. If he had used ordinary care, he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.

LORD ELLENBOROUGH, C. J.: A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person's being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

Davies vs. Mann, 10 M. & W. 546. Exchequer (1842).

THE DONKEY CASE.

The plaintiff fettered the fore feet of a donkey and turned the beast into a public road to graze. The defendant's wagon came down the road at what a witness called a smartish pace and on a slight descent ran down the donkey, which was unable to get out of the way and soon afterwards died from the injuries caused by the collision. The driver of the wagon seems to have been following his horses on foot. At the trial the judge told the jury that, though the act of the plaintiff in putting the beast into the highway in such condition might be illegal and negligent, the defendant was liable if the proximate cause of the injury was the want of proper conduct on the part of the driver, and if the accident might have been avoided by the exercise of ordinary care on his part. The jury found for the plaintiff, and it was held that the direction given to them was correct.*

*This [*i. e.*, the judgment in Radley vs. Rwy. Co., 1 App. Cas. 754 (1876),] leaves no doubt that the true ground of contributory negligence being a bar to recovery is that it is the proximate cause of the mischief; and negligence on the plaintiff's part which is only one of the inducing causes will not disable him. I say the "proximate cause," considering the term as now established by usage and authority. But I would still suggest, as I did in the first edition, that "decisive" might convey the meaning more exactly. For, if the defendant's original negligence were so far remote from the plaintiff's damage as not to be part at least of its "proximate cause," within the more general meaning of the term, the plaintiff would not have any case at all, and the question of contributory negligence could not arise. * * * The plaintiff's negligence, if it is to disable him, has to be somehow more proximate than the defendant's. It seems dangerously ambiguous to use "proximate" in a special emphatic sense without further or otherwise marking the difference. If we said "decisive," we should at any rate avoid this danger: Pollock on Torts (Am. ed.), p. 573.

LORD ABINGER, C. B.: The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there; but even were it otherwise, it would have made no difference, for, as the defendant might by proper care have avoided injuring the animal and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there.

PARKE, B.: This subject was fully considered by this court in the case of Bridge vs. The Grand Junction Railway Company, 3 M. & W. 246, where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that "the rule of law is laid down with perfect correctness in the case of Butterfield vs. Forrester, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong." In that case of Bridge vs. Grand Junction Railway Company there was a plea imputing negligence on both sides; here it is otherwise: and the judge simply told the jury that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if they were of opinion that it was caused by the fault of the defendant's servant in driving too fast, or, which is the same thing, at a smartish pace, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such pace as would be likely to prevent mischief. Were this not so, a man might justify driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

Tuff vs. Warman, 2 C. B. N. S. 470. Common Pleas (1857). Affirmed in the Exchequer Chamber, 5 C. B. N. S. 573.

The plaintiff's barge, the Nancy, was sailing down the Thames with only two men on board. One of these was at the helm, and was so placed that he could not see the river ahead except by stooping and looking under the sail. What the other man was doing did not appear; but it was certain that he was not on lookout duty, that function being left entirely to the helmsman. The defendant was a pilot in charge of a steamer,

the Celt, which was proceeding up the stream. The helmsman on the barge saw the steamer at a considerable distance, but after that view he did not again look under the sail until she was within two or three yards of him. The defendant saw the barge at a distance of three hundred yards, and at once ported his helm, which action would have averted a collision had the barge done the same. The defendant, assuming that the barge would do this, kept the steamer in her course until, when he found that the barge was not changing her course, it was too late to avoid a collision, which occurred and resulted in damage to the barge. There was some testimony to the effect that the steamer did not port her helm as the defendant and other persons on the Celt declared she had done; and it seemed, on the whole case, pretty plain that the steamer, after seeing the barge, might, by the exercise of caution and by due regard to the evident mismanagement of the latter craft, have cleared her.

The manner in which the barge was navigated was not only in itself imprudent but also in clear violation of certain Admiralty regulations formulated pursuant to a statute, which statute provided that, in any case of collision caused by non-observance of those regulations, "the owner of the ship by which such rule has been infringed shall not be entitled to any recompense whatever for any damage sustained by such ship in such collision."

At the trial the judge told the jury that, if both parties were equally to blame, and the collision was the result of their joint negligence, the plaintiff could not recover; that if the negligence or default of the plaintiff was in any degree the proximate cause of the damage, he could not recover, however great may have been the negligence of the defendant; but that, if the negligence of the plaintiff was only remotely connected with the accident, then the question was, whether the defendant might not, by the exercise of ordinary care, have avoided it; and that, as the people on the barge were keeping no lookout, the defendant should have gone to starboard or reversed his engines, and so avoided the collision. He referred for illustration to the case of Davies vs. Mann, and thus concluded: "Do you consider that the absence of a lookout was negligence on the part of the plaintiff? If, so, you will consider whether it directly contrib-

uted to the accident. If you think that the plaintiff directly contributed to the accident, you will find for the defendant; but if you think that the defendant, by his negligence, directly caused the injury, you must find for the plaintiff."

The verdict was for the plaintiff. *Held,* that the direction to the jury was correct.

In the course of the argument in the Common Pleas, these questions were asked from the bench by

COCKBURN, C. J.: Suppose the defendant saw the bargeman asleep at his helm, would he have been—independently of the statute—justified in keeping on his course and running into him? How does that case differ from that of a man falling asleep when driving, or of a drunken man lying on a highway?

In the Common Pleas were delivered opinions from which the next following passages are extracted.

COCKBURN, C. J.: At first, it struck me rather forcibly that, the statute having prescribed that certain things shall be done and certain regulations followed, and then providing that, in cases of collision, where it shall appear to the court that such collision was occasioned by the non-observance of these rules, the owner of the ship by which such rules have been infringed shall not be entitled to recover any recompense whatever for any damage sustained by the vessel from such collision, unless it be shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary—prescribing these matters peremptorily and absolutely, and making provision for what shall be the consequence of a contravention of those regulations—it was not a question whether their non-observance had caused or contributed to the accident, but that such non-observance was a matter upon the establishing of which the plaintiff's right to recover is absolutely precluded by the statute. Upon further consideration, however, and upon the authority of the cases of Morrison vs. The General Steam Navigation Company, 8 Exch. 733, and Dowell vs. The General Steam Navigation Company, 5 Ellis & Bl. 195, I have felt myself constrained to come to a different conclusion. In the former of these cases, the Court of Exchequer distinctly lay it down that the regulations in question have effected no change in the law, but that all persons navigating vessels are bound to exercise ordinary care and vigilance just as before; and that, if it be clearly established that a vessel having no light has been run into by another vessel by sheer carelessness and negligence in not keeping a proper lookout, the party sustaining damage is entitled to compensation. That shows that all that the statute has done is to bring within the category of negligence the non-observance of the regulations prescribed by section 296 [Stat. 17 & 18 Victoria, c. 104, the Merchant Shipping Act]; and that, in the event of

accident arising from such non-observance. the case stands precisely as it did before, and the question is to be tried by the ordinary rules. That being so, I think the direction was right, and that the true question in these cases is, whether, the damage having been occasioned by the negligence of the defendant, the negligence of the plaintiff has directly contributed to it; and I think that, in this case, if the defendant could have made out negligence on the part of the plaintiff, that would have been an answer to the action. The way in which it was put on the part of the defendant was this, that, by his own negligence in omitting to keep any lookout, the plaintiff contributed to the accident. If that had been established to the satisfaction of the jury, the plaintiff would have been directly contributory, and the defendant would have been entitled to a verdict. That question *was* left to the jury, with such observations as suggested themselves to the learned judge. There being no misdirection, therefore, and the learned judge not being dissatisfied with the verdict, we see no ground for disturbing it.

CRESSWELL, J.: As to the question of law, it seems that the learned judge, with reference to the alleged non-compliance with the Admiralty regulations, told the jury that the question was, whether the plaintiff, by neglecting to comply with them, had directly contributed to the accident. That direction was objected to; and it was said that the proper question for the jury was, whether the negligence of the plaintiff was at all contributory to the accident, and that the proper test was, whether by the exercise of ordinary care he might have avoided the collision. That matter is disposed of by the case of Dowell vs. The General Steam Navigation Company, 5 Ellis & Bl. 195. LORD CAMPBELL, speaking of Davies vs. Mann, 10 M. & W. 546, there says: "In some cases there may have been negligence on the part of the plaintiff, remotely connected with the accident; and in those cases the question arises whether the defendant, by the exercise of ordinary care and skill, might have avoided the accident, notwithstanding the negligence of the plaintiff, as in the often quoted donkey case, Davies vs. Mann. There, although without the negligence of the plaintiff the accident could not have happened, the negligence is not supposed to have contributed to the accident, within the rule on this subject; and if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his gross negligence it is entirely ascribed, he, and he only, proximately causing the loss." So here, without the negligence of the plaintiff in omitting to port his helm when he found a collision imminent, the accident possibly might not have happened; yet that negligence might not have contributed to the accident within the rule.

In the Court of Exchequer Chamber, on appeal, the judgment of the Common Pleas was affirmed (1858), the opinion of the court being delivered by

WIGHTMAN, J.: It appears to us that the proper question for the jury in this case, and indeed in all others of like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed

to the misfortune by his own negligence, or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover, in the latter, not; as, but for his own fault, the misfortune would not have happened. Mere negligence, or want of ordinary care and caution would not, however, disentitle him to recover, unless it were such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened; nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff. This appears to be the result deducible from the opinions of the judges in Butterfield vs. Forrester, 11 East. 60; Bridge vs. The Grand Junction Railway Company, 3 M. & W. 246; Davies vs. Mann, 10 M. & W. 548; and Dowell vs. The General Steam Navigation Company, 5 E. & B. 206.

In the present case, the main objection taken to the summing up was, that the judge left to the jury, whether the plaintiff, by his negligence, "*directly*" contributed to the misfortune: and it was contended for the defendant that, whether he directly or indirectly contributed, was immaterial, if he contributed to it by his negligence at all. But the direction to the jury must have reference to the evidence in the case; and taking the whole summing up together, in connection with the evidence, we do not think the jury could have been misled by the use of the word "directly." The learned judge told the jury that, if the absence of a lookout was negligence on the part of the plaintiff, still, if the defendant also had a lookout and nevertheless persisted in a course that would inflict injury, he would be liable though the plaintiff had no lookout; for that neglect of the plaintiff would not be the direct cause of the injury, that is to say, would not be a cause without which the injury would not have happened. In this, which seems to be the obvious sense in which the word "directly" was used, we do not think there was any misdirection.

McNab vs. United Railways Company, 94 Md. 719 (1902).

Mrs. McNab, driving upon a country road, approached the intersection of the double track of an interurban line. She slackened her speed, but did not stop, and seeing and hearing no indication of a coming car, she drove upon the first rails. Then she saw, upon the further track, at a short distance, a car approaching at high speed. The horse was between the tracks, and, being accustomed to trains, was not likely to become fractious, nor would he have been struck by the car had Mrs. McNab remained in her present position. The lady, however, instead of doing so or backing, urged the horse ahead in an attempt to cross the line. The carriage was struck by the car and Mrs. McNab sustained personal injuries, on account of which she sued the railway company. It appeared at the trial that the motorman on the car had not sounded his bell in the neighborhood of the crossing nor otherwise signaled his approach, nor had he, when he saw Mrs.

McNab, done anything to avert a collision with her carriage. These facts, it was contended on the part of the plaintiff, fixed a liability upon the company even if it should be considered that Mrs. McNab had been guilty of contributory negligence.

Held, that the conduct of Mrs. McNab amounted to contributory negligence; and that such contributory negligence, being the final or decisive cause of the accident, disentitled her to recover.

McSHERRY, C. J.: The position taken by the appellee in this Court as well as in the Court below concedes that the railway company's employees were guilty of negligence; and the contention is and was that there can be no recovery because Mrs. McNab, by her own negligence, contributed to the infliction of the injury which befell her. Contributory negligence is simply negligence, and is, like primary negligence, relative and not absolute, and being relative it is dependent on the peculiar circumstances of each particular case. There are many acts which would not be negligent when done under some condition, though the same acts if done under different conditions might be highly negligent. And this is equally true of contributory negligence. So, ultimately, in every case of this character it becomes necessary to view the entire surroundings to determine whether either primary or contributory negligence has been established. * * * It is perfectly obvious from the plaintiff's own testimony that when she saw the approaching car she was in a place of safety; that by staying for a moment where she then was she would not have incurred any risk of injury either from the car or from the frightening of her horse (the horse was accustomed to the cars); that there was no reason whatever for her not remaining in that place of safety, other than her indisposition to go back if she could go forward; and that she deliberately went forward in the face of an imminent and apparent danger because she thought she could get across the south track before the car reached the point at which she was crossing. This was sheer recklessness. No matter how negligent the company's servants may have been in failing to give signals or warnings of the approach of the car to the crossing, Mrs. McNab, after she saw the danger of leaving a place of safety and attempting to cross directly in front of the rapidly moving car, was, when she drove forward, equally guilty of negligence which immediately contributed to the infliction of the injury which she sustained; and that contributory negligence is a bar to a recovery on her part. * * * There is nothing in the suggestion that, even though Mrs. McNab was herself guilty of negligence, the company's servants were blamable because they made no effort to avoid the consequences of her negligence. And there is nothing in the suggestion because the *last* act of negligence was committed by Mrs. McNab. The doctrine here invoked presupposes that the company's employees knew, or by the use of due care could have known, the peril in which the injured party had by her own negligence placed herself, and that they either knew or could have known of that peril in time to avert the injury. When the motorman saw—and we may presume that he did see, because he could have seen—that Mrs. McNab was in a place of safety, he was under no obli-

gation to assume that she would deliberately leave that place and drive into the jaws of danger. As said in Neuber's case, 62 Md. 401: "But it was not the duty of those in charge of the train to anticipate the conduct of the plaintiff, and, because they saw him approach the crossing, to conclude that he would attempt to cross in advance of the train. On the contrary, they were, or would have been, fully justified in supposing that he would not venture to cross until after the passage of the train." There is not the faintest gleam of evidence to show that the motorman could have stopped the car or checked its speed so as to avoid the collision after Mrs. McNab drove upon the track on which the car was moving. The doctrine is only applicable when the company's negligence in not avoiding the consequences of the plaintiff's negligence is the *last* negligent act. It can never be invoked when the plaintiff's own act is the final negligent act.

Klipper et al. vs. Coffey, 44 Md. 117 (1876).

Coffey was the driver of a public cab and was assigned to stand in Monument Square in Baltimore. By the provisions of a municipal ordinance, it was his duty to remain either upon the box or so near to his carriage as to be able to keep his horses always under his control. The appellants, who were the defendants below, were dealers in furniture, and in the course of their business were accustomed to transfer large quantities of their goods from one to another part of the city. On one occasion, one of their wagons loaded with furniture was passing by Monument Square when, by reason of negligent loading, the freight became loosened and slipped from the wagon. At the moment, Coffey was neither on the box of his cab nor so near thereto that he could control his horses; and the animals, being freightened by the falling furniture, ran away and injured themselves and the cab.

Coffey brought this action to recover his damages, which, as he contended, were occasioned by the negligence of the furniture dealers in loading their wagon. The defence was that the plaintiff had, himself, been guilty of the negligence which was the direct or decisive cause of the runaway.

Held, that the negligence of the plaintiff, being only the remote cause of the injury, did not disentitle him to recover for the injuries by him sustained which the defendants might have prevented by the exercise of ordinary care on their part.

BRENT, J.: The question is one of contributory negligence. * * * Although the appellee may have been in violation of the ordinance referred to, by not being as near his carriage and horses as the ordinance requires, it by no means follows, as a matter of course, that his conduct contributed directly to the injuries complained of. Because a plaintiff is himself negligent or is acting in violation of a law, he is not therefore prevented from recovering damages for an injury, which has resulted from the negligence of a defendant, where, but for the want of ordinary care on the part of the defendant, the misfortune would not

have happened. In the case of Davies vs. Mann, 10 M. & W. 545, where a fettered donkey was turned by his owner upon a public highway and injured by a passing wagon, the Court held that, though the act of turning him upon the highway in that condition might be *illegal*, yet if the jury thought the accident might have been avoided by ordinary care on the part of the driver, they must find for the plaintiff. The same doctrine is found in the case of The Balto. & Ohio R. R. vs. State, use of Dougherty, 36 Md. 366. Numerous other cases might be cited to the same effect, but the doctrine is now too well settled to be doubted.

In the case of Steele vs. Burkhardt, 104 Mass. 59, the action was maintained for injury done to a horse left standing in one of the streets of Boston, in violation of a city ordinance. The same defense was set up in that case as in this. The Court says: "It did show negligence in respect to keeping the ordinance, but did not necessarily show negligence that contributed to the injury."

Baltimore & Ohio Railroad Company vs. Mulligan, 45 Md. 486 (1877).

Mulligan permitted his cow to go at large in the highways, and she wandered upon the track of the railroad company, where she was killed by a train. In this action brought by Mulligan against the company, to recover for the loss of his animal, the defendant contended that, without regard to the negligence of its trainmen, the plaintiff was, by reason of his own negligence in the care of the cow, disentitled to recover.

Held, that notwithstanding the negligence of the plaintiff, he was entitled to recover for the destruction of his property if that was directly due to the negligence of the company's servants, and might have been avoided by the exercise of due care on their part.

ROBINSON, J.: * * * The plaintiff is here claiming damages for a cow, killed on the railroad track of the defendant, and the latter contends, that if the owner permitted or suffered the cow to stray upon the track of the railroad, such negligence on his part, constitutes a bar to the action. On the other hand, it is insisted that, although the cow may have been upon the road *wrongfully*, yet the plaintiff is entitled to recover, if the jury should find that the defendant might, by the exercise of ordinary care have avoided the injury. So the broad question is presented, whether a railroad company is bound to exercise ordinary care, in order to avoid injury to cattle or other stock found trespassing upon its road? It seems to us there ought not to be any difficulty in deciding this question, and yet it must be admitted that the decisions, in this country at least, are somewhat conflicting. We think, however, the best considered cases, both in England and here, hold the law to be, that mere negligence or want of ordinary care on the part of the plaintiff, will not preclude his right to recover, provided the defendant might, by the exercise of ordinary care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff.

So early as *Butterfield vs. Forrester*, 11 East. 60, LORD ELLENBOROUGH C. J., said: "One person being in fault will not dispense with another's using ordinary care for himself."

And then in *Davies vs. Mann*, 5 M. & W. 546, LORD ABINGER said: "As the defendant might, by proper care, have avoided injuring the animal and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there."

And then again, in *Mayor vs. Brooke*, 7 Ad. & El. N. S. 377, LORD DENMAN said: "As a general rule of law, every one in the conduct of that which may be harmful to others, if misconducted, is bound to the use of due care and skill, and the wrongdoer is not without the pale of the law for this purpose."

These cases were reviewed, and the question fully considered by the Court of Exchequer Chamber, in *Tuff vs. Warman*, 94 E. C. L. 573, and it was held, that mere negligence or want of ordinary care on the part of the plaintiff, would not disentitle him to recover, if the defendant might, by the exercise of ordinary care and caution, have avoided the neglect or carelessness of the plaintiff.

The rule thus laid down has been sanctioned and approved by the highest courts in several States in this country, and we think it a just and reasonable one. State vs. R. R. Co., 52 N. H. 528; Kerwhacker vs. R. R. Co., 3 Ohio St. 172; R. R. Co. vs. Hiatt, 17 Md. 102; R. R. Co. vs. Patton, 31 Miss. 156; Beers vs. R. R. Co., 19 Conn. 572.

It is a duty resting upon every one, so to conduct himself, and so to use his own property, as not to inflict unnecessary and avoidable injury upon the person and property of another. A railroad company, it is true, is entitled to the exclusive and unmolested use of its road; and it is the duty of owners to keep cattle within their enclosures, but the failure to do so, will not justify persons in the charge and management of a railway train to run over them, if by the exercise of ordinary care it can be avoided.

The owner of land is also entitled to its exclusive use, and has the right to expel cattle or other stock trespassing upon it, but in so doing he has no right to inflict unnecessary injury. So, too, cattle found upon a public highway, strictly speaking, may be said to be there unlawfully, and yet no one has the right to run over and injure them, if it can be avoided by the exercise of reasonable care. We see no good reason why railroad companies should be exempt from this common and universal obligation. We do not mean to say, they are obliged to observe the same particular acts of caution required of persons traveling on an ordinary highway. We recognize the fact, that they have duties of a public nature to perform, and we are not to be understood as deciding, they are obliged necessarily to stop the trains and thereby miss their connections, much less to endanger in any manner the safety of passengers. No one has the right to complain of injury to cattle or other stock which he has permitted to stray upon a railroad track, unless such injury can be avoided, consistently with these *higher and paramount duties resting upon the company*. What we mean to say and decide is

this: that it is the duty of the company to exercise reasonable care to avoid injury to cattle or stock found on its road, though such cattle and stock may be there through the negligence of the owner. What is *reasonable* care, is a question for the jury, to be determined according to the facts and circumstances of each particular case. * * *

The cases of R. R. Co. vs. Lamborn, 12 Md. 259, and Keech vs. R. R. Co., 17 Md. 45, are not, we think, in conflict with these views. In the former it was held, that the Acts of 1838 and 1846 which made railroad companies responsible for injuries to cattle and other stock, unless the *companies proved* that the injury was the result of *unavoidable accident*, did not apply to a case in which the plaintiff's negligence had directly contributed to the injury. But in *Keech's Case* it was decided, that if the horse was upon the railroad track *without the fault of the plaintiff*, these Acts did apply, and it was incumbent on the company to prove that the injury was the result of unavoidable accident. It is true, the court said, as a general rule a plaintiff will not be entitled to recover, if his negligence *directly* contributed to the injury complained of, but the precise question presented by the prayers in this case, whether it is the duty of a railroad company to exercise reasonable care to avoid the consequences of the plaintiff's negligence, was not considered nor decided.

Since these cases, the rule we have laid down has been distinctly recognized and approved by this court and must be considered as the settled law of this State.

Richmond & Danville Railroad Company vs. Didzoneit, 1 App. D. C. 482 (1893).

Didzoneit, a boy of sixteen, fell asleep upon the platform at a station on the line of the defendant company, and he lay in such a position that one of his feet rested on one of the rails. A freight train stopped at the station, the engineer went into the telegraph office for orders, and, coming out, mounted the cab and started the train. Either he did not observe Didzoneit's danger, or, seeing it, he supposed the boy would move before the train reached him; and, when the engineer realized that the sleeper was not going to move, it was too late to stop the train and the boy's foot was injured. In this action brought by Didzoneit against the railroad company for the negligence of the engineer, the defence was that the plaintiff himself had been guilty of contributory negligence in going to sleep in a position of such danger. Against this it was contended for the plaintiff that the engineer had been negligent in not observing the danger of the plaintiff, and that this negligence, being the direct cause of the mischief, fixed the responsibility upon the company. It was held that, since the engineer did not have actual knowledge of the plaintiff's danger, and did not recklessly or wantonly injure him, the engineer's negligence in not observing that danger was not such a breach of duty as would countervail the contributory negligence of the plaintiff, and the defendant was not liable.

MORRIS, J.: It is quite evident that the plaintiff's misfortune in this case was the result, either proximately or remotely, of his own negligence, and the heedlessness of youth constitutes no sufficient legal excuse for his indiscretion. This position, indeed, it is not sought to controvert. But it is sought to bring the case within the modification of the rule in regard to contributory negligence, which is now very well established and which is stated by Mr. Cooley in his work on Torts in the following language:

"If the defendant discovered the negligence of the plaintiff in time by the use of ordinary care to prevent the injury, and did not make use of such care for the purpose, he is justly chargeable with reckless injury and cannot rely upon the negligence of the plaintiff as a protection." Cooley on Torts, p. 674.

Another writer has equally well expressed the principle as follows: "Although the plaintiff has negligently exposed himself to the injury, yet if the defendant, after discovering the exposed situation, inflicts the injury upon him through a failure to exercise ordinary care, the plaintiff may recover damages."

Is this principle applicable to the plaintiff's case? Or, is the case to be governed by the general rule which visits the whole penalty of contributory negligence on the plaintiff himself?

It will be noticed that it is reckless injury and willful negligence that will not excuse a defendant, when they occur after a case of contributory negligence in the plaintiff. Negligence superimposed upon negligence does not amount to willfulness; nor is the failure, superinduced by negligence, to have knowledge of a dangerous condition the equivalent of actual knowledge of such condition. And it is only when a defendant has actual knowledge of the plaintiff's danger, and could, by the exercise of ordinary care and prudence, have avoided the resulting injury, that the plaintiff is relieved from the liability of having his own negligence charged against him, and the defendant's negligence is regarded as the proximate and exclusive cause of the injury. The fact that it may have been negligence in the defendant not to have known the plaintiff's danger, and that the defendant might have ascertained the danger by the exercise of due care, cannot be permitted to have the effect of actual knowledge, so as to charge the defendant with recklessness. To allow such an effect would result in the overthrow of the whole doctrine of contributory negligence. It would be impossible, upon such a theory, ever to hold anyone to the consequences of his own misconduct. For if negligence to acquire knowledge were the equivalent of knowledge, in the contemplation of the law of torts, every act of negligence should be construed as an act of willfulness.

Stearman vs. Baltimore & Ohio Railroad Company, 6 App. D. C. 46 (1895).

Cullen vs. Baltimore & Potomac Railroad Company, 8 App. D. C. 69 (1896).

In each of these cases the action was for the death of a person who had been killed by a train of the defendant company. In each case there was evidence of contributory negligence on the part of the deceased, but it was contended that the death might have been prevented had the engineer of the train used proper diligence to discover the danger of the deceased. In both it was held that the doctrine of last clear chance did not extend so as to fix a liability upon a defendant, where there was negligence on the part of the plaintiff, and the defendant did not have actual knowledge of the peril, but was merely negligent in not having such actual knowledge, the Didzoneit case, *supra*, being cited and applied.

In the two cases following the view of the court on this point seems to have been modified:

Hawley vs. Columbia Railway Company, 25 App. D. C. 1 (1904).

Hawley attempted to board an eastbound car on the west side of Fourteenth street at the intersection of New York avenue, where four lines of track lie very close together. The motorman of a westbound car on the Columbia line started his car across Fourteenth street and, while crossing, leaned over his dashboard and undertook to arrange his fender. Being thus engaged, he did not see Hawley, who was standing in a narrow space between the two tracks, and so near to the Columbia track that he was struck by the car of that line crossing Fourteenth street. In this action brought by Hawley to recover for the injuries sustained by him from the collision, the defendant company insisted that he had been guilty of contributory negligence in placing himself in a position of peril. He was, notwithstanding, allowed to recover, the court holding that, although he had been negligent in exposing himself to danger, the company was liable for the negligence of its motorman, which had prevented him from perceiving the perilous condition of the plaintiff and so avoiding the collision.

MORRIS, J.: We are of opinion that the case before us falls within the rule laid down by the Supreme Court of the United States in the case of Grand Trunk Railway vs. Ives, 144 U. S. 408, and in the case of Inland and Seaboard Coasting Co. vs. Tolson, 139 U. S. 551, wherein it was held that the contributory negligence of a person injured will not defeat his action if the defendant by reasonable care and prudence might have avoided the consequences of such contributory negligence. Here the motorman of the defendant company had ample opportunity

to guard against the accident if he had been using even ordinary care and prudence and attending to the proper performance of his duty, which he evidently was not doing if the testimony of the plaintiff's witnesses is to stand unimpeached. At one of the most dangerous crossings in the city of Washington he was not looking ahead, as he should have looked, and he had abandoned all control both of the controller and of the brake of the car.

It will not do, in a case of this kind, to hold the plaintiff as the sole author of his own misfortune, when the defendant, by the use even of ordinary care and prudence, could have avoided the accident, even after contributory negligence had supervened.

Baltimore and Ohio Railroad Company vs. Griffith, 34 App. D. C. 469 (1910).

Griffith owned a wagon and a team of horses, which were driven by one Fortune, and with which the latter drove upon the track of the railroad company. The gates were up, but a train backing toward the crossing, and about a hundred feet therefrom, might have been seen by Fortune but for the fact that he was asleep. The conductor and the brakeman of the train were standing on the platform of the first car, and the brakes were sufficient to stop the train within fifty feet. No attempt was made to use the brakes until the wagon had gotten upon the track and the train was within twenty-five feet of the crossing. It was then too late to avoid a collision, whereby Fortune was killed and the wagon and horses were greatly damaged. In this action, brought by Griffith to recover the value of his property, it was held that, though Fortune seemed to have been guilty of contributory negligence, the company was liable if its servants, observing his peril, could have prevented the mischief by the exercise of reasonable care and prudence.

Washington Railway & Electric Company vs. Cullember, 39 App. D. C. 316 (1913).

Cullember brought this action to recover for personal injuries sustained by him in being struck by a car of the defendant company. There was evidence upon which it was contended that the collision was due to contributory negligence on the part of the plaintiff; and there was other proof to the effect that the driver of the car might, by the exercise of reasonable care, have seen Cullember in time to prevent the collision. *Held*, that, in such a state of facts, the defendant was liable, notwithstanding the contributory negligence of the plaintiff.

SHEPARD, C. J.: It is a settled principle of law that, notwithstanding the plaintiff's own negligence may have exposed him to the risk of injury, he may nevertheless recover if the defendant's negligence, after becoming aware of the plaintiff's danger, was directly responsible for that injury. * * * The contention on behalf of the appellant is that

in the application of this principle it is essential that the defendant shall have been actually aware of, that is to say, shall have actually seen the danger of the plaintiff in time to prevent injury by the exercise of reasonable care; and it is not sufficient merely that the defendant . . . could have seen him by the use of reasonable diligence "in time to stop the car." Granting for the purpose of the argument that this may be a correct application of the rule in the case of steam railway trains crossing public highways, it does not necessarily follow that it extends to the operation of street cars in the streets of cities and towns. * * *

The rights and duties of railway companies and of individuals traversing the streets of the city are reciprocal. Each must recognize the rights of others and exercise reasonable care to avoid inflicting or receiving injury. Appellant's contention that plaintiff was guilty of contributory negligence, as matter of law, rests upon the proposition that under the evidence he could and should have seen the coming car before attempting to cross the tracks. It was likewise the duty of the motorman to see that which he could have seen if exercising ordinary care. Knowing that vehicles must frequently cross the car tracks, it was his duty not only to his passengers, whose safety might be endangered by collisions, but to the general public, to run his car within the rate of speed prescribed by law, to keep a lookout ahead of him, to keep his car under reasonable control, and to stop the same if reasonably possible in time to avoid injury to one who, even by his own negligence, has exposed himself to danger. The conditions of modern city life make this a reasonable rule of sound public policy looking to the preservation of public safety. The evidence tended to show that the motorman, if exercising reasonable care, could have seen the danger of the plaintiff in time to have stopped his car, if under proper control, and avoided the collision.

Liability to Remote Vendees.

Langridge vs. Levy, 2 M. & W. 519. Exchequer (1837). Affirmed in the Exchequer Chamber, 4 M. & W. 337.

The defendant, a gun-maker, sold to the elder Mr. Langridge, the father of the plaintiff in this action, a shotgun which Levy warranted to have been made by Nock, a gun-maker of high repute, for the then lately deceased King George IV., and also to be safe and secure. Langridge stated at the time of the purchase that he wanted the gun for the use of himself and his sons. The gun was in fact not of Nock's manufacture, and the jury found upon the proof in the case that it was unsafe and of inferior materials and workmanship. After about six months'

use of the gun by Langridge and his sons, it exploded when being fired by one of the sons and blew off one of his hands. The injured youth brought this action on the case, setting forth the facts as they have been stated. After a verdict for the plaintiff, Levy moved in arrest of judgment on the ground that, as there had been no privity of contract between himself and the plaintiff, the latter could not recover upon the defendant's contract and warranty, which were made with and to the senior Langridge. The Court of Exchequer, in an opinion delivered by Mr. Baron Parke, allowed the plaintiff to take judgment upon the verdict, holding that the defendant, though not liable to the plaintiff upon the contract, was still liable as for a deceit which had injured the plaintiff, and of which the false warranty made to the plaintiff's father had been used as a means. This judgment was affirmed by the Court of Exchequer Chamber in a brief opinion by LORD DENMAN, C. J.

PARKE, B.: It is clear that this action cannot be supported upon the warranty as a contract, for there is no privity in that respect between the plaintiff and the defendant. The father was the contracting party with the defendant, and can alone sue upon that contract for the breach of it.

The question, then, is whether enough is stated on this record to entitle the plaintiff to sue, though not on the contract; and we are of opinion that there is, and that the present action may be supported.

We are not prepared to rest the case upon one of the grounds on which the learned counsel for the plaintiff sought to support his right of action, namely, that, wherever a duty is imposed on a person by contract or otherwise, and that duty is violated, any one who is injured by the violation of it may have a remedy against the wrongdoer: we think this action may be supported without laying down a principle which would lead to that indefinite extent of liability, so strongly put in the course of the argument on the part of the defendant; and we should pause before we made by our decision a precedent which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of *any person* whomsoever into whose hands they might happen to pass, and who should be injured thereby. We do not feel it necessary to go to that length, and our judgment proceeds upon another ground.

If the instrument in question, which is not in itself dangerous, but which requires an act to be done, that is, to be loaded, in order to make it so, had been *simply* delivered by the defendant, without any contract or representation on his part, to the plaintiff, no action would have been maintainable for any subsequent damage which the plaintiff might have sustained by the use of it. But if it had been delivered by the

defendant to the plaintiff, for the purpose of being used by *him*, with an accompanying representation to him that he might *safely so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of it being true, and had received damage thereby, then there is no question but that an action would have lain, upon the principle of a numerous class of cases, of which the leading one is that of Pasley vs. Freeman, 3 T. R. 51; which principle is, that a mere naked falsehood is not enough to give a right of action; but if it be a falsehood told with an intention that it should be acted upon by the party injured, and that act must produce damage to him; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff*, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have his remedy for the deceit; nor could it make any difference that the third person also was intended by the defendant to be deceived; nor does there seem to be any substantial distinction if the instrument be delivered, in order to be so used by the plaintiff, though it does not appear that the defendant intended the false representation itself to be communicated to him. There is a false representation made by the defendant, with a view that the plaintiff should use the instrument in a dangerous way, and, unless the representation had been made, the dangerous act would never have been done.

If this view of the law be correct, there is no doubt but that the facts which upon this record must be taken to have been found by the jury bring the case within the principle of those referred to. The defendant has knowingly sold the gun to the father, for the purpose of being used by the plaintiff by loading and discharging it, and has knowingly made a false warranty that it might safely be done, in order to effect the sale; and the plaintiff, on the faith of that warranty, and believing it to be true, . . . used the gun and thereby sustained the damage which is the subject of this complaint. The warranty between these parties has not the effect of a contract; it is no more than a representation; but it is no less. * * *

We therefore think that, as there is fraud, and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured.

We do not decide whether this action would have been maintainable if the plaintiff had not known of and acted upon the false representation; nor whether the defendant would have been responsible to a person not within the defendant's contemplation at the time of the sale, to whom the gun might have been sold or handed over. We decide that he is responsible in this case for the consequences of his fraud whilst the instrument was in the possession of a person to whom his representation was either directly or indirectly communicated, and for whose use he knew it was purchased.

Winterbottom vs. Wright, 10 M. & W. 109. Exchequer (1842).

Wright, a carriage-builder, made with the Postmaster General a contract, by the terms of which Wright agreed to build a coach for the conveyance of the mails and to keep it in repair so long as it should be so used. The coach being delivered to the Postmaster General, that officer entered into a contract with one Atkinson, whereby the latter bound himself to carry the mails by that coach, to furnish for that purpose horses and a driver, and not to use any other vehicle in the service contracted for. Atkinson employed the plaintiff to drive the coach. Whilst the plaintiff was engaged in the performance of that duty, the coach broke down by reason of defects in its construction and of the lack of proper repairs, and the plaintiff was injured. He brought this action, his declaration setting out the foregoing facts, and proceeding upon the assumption that the defendant was responsible to him for the negligence committed in the building and repair of the coach.

Held, that the plaintiff was not entitled to recover, since the defendant was guilty of no breach of duty towards him, the delinquency of the defendant being only a breach of his contract with the Postmaster General, in respect of which there was no privity between the plaintiff and the defendant.*

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*"The maker of a chattel, who sells it to a third person, is responsible for a harm caused by the chattel's defect to a person who is vendee or bailee from the first or other intermediate bailee, in the following circumstances:

"1. If the defect in the chattel was one which would have made the maker responsible for similar harm to the original vendee; *i. e.*, if the harm under the circumstances should have been foreseen as culpably probable to one using the chattel in the manner for which it was adapted. [Citing Kuelling vs. Mfg. Co., 183 N. Y. 78.]

"2. If the chattel either (*a*) was inherently dangerous to life except when used under certain conditions which any person would observe if he knew the nature of the article, and it was not so labelled as to indicate its nature [citing Thomas vs. Winchester, 6 N. Y. 397], or (*a*1) was culpably defective, and because of its defect (though not because of its general nature when sound) was dangerous to life under any conditions of its natural use, and (*b*) was in either case used by one of a class of persons whom the maker could have expected to use it [citing Huset vs. Threshing Machine Co., 120 Fed. 866].

"Par. 2 is an attempt to state the doctrine generally accepted today. But it is essentially unsound in its limitations, and it cannot be stated so as to be logically consistent.

"Par. 1 is the only sound form of principle, *i. e.*, nothing more than a specific application of the general principle of negligence. There never has been any good reason for limiting that principle in this class of cases. The original case [Winterbottom vs. Wright], which gave the twist putting the later cases out of gear, was obviously a contract claim, and should never have been allowed to affect the Tort doctrine": Wigmore, Cases on Torts, v. 1, app. p. xlvi.

ABINGER, C. B.: This is an action of the first impression, and it has been brought in spite of the precautions which were taken in the judgment of this court in the case of Levy vs. Langridge, 4 Mees. & W. 337, to obviate any notion that such an action could be maintained. * * * There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue. * * * There is a class of cases in which the law permits a contract to be turned into a tort; but, unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract. Thus a carrier may be sued either in assumpsit or case; but there is no instance in which a party, who was not privy to the contract entered into with him, can maintain any such action. The plaintiff in this case could not have brought an action on the contract.

ALDERSON, B.: The contract in this case was made with the Postmaster General alone; and the case is just the same as if he had come to the defendant and ordered a carriage, and handed it at once over to Atkinson. If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty. The only real argument in favor of the action is that this is a case of hardship; but that might have been obviated if the plaintiff had made himself a party to the contract.

Then it is urged that it falls within the principle of the case of Levy vs. Langridge. But the principle of that case was simply this, that the father having bought the gun for the very purpose of [its] being used by the plaintiff, the defendant made representations by which he was induced to use it. There a distinct fraud was committed on the plaintiff; the falsehood of the representation was also alleged to have been within the knowledge of the defendant who made it, and he was properly held liable for the consequences. How are the facts of that case applicable to those of the present? Where is the allegation of fraud or misrepresentation in this declaration? It shows nothing of the kind. Our judgment must therefore be for the defendant.

ROLFE, B.: The breach of the defendant's duty stated in this declaration is his omission to keep the carriage in a safe condition; and when we examine the mode in which that duty is alleged to have arisen, we find a statement that the defendant took upon himself, to wit, under and by virtue of the said contract, the sole and exclusive duty, charge, care and burden of the repairs, state and condition of the said mail coach, and, during all the time aforesaid, it had become and was the sole and exclusive duty of the defendant, to wit, under and by virtue of his said contract, to keep and maintain the said mail coach in a fit,

proper, safe and secure state and condition. The duty, therefore, is shown to have arisen solely from the contract; and the fallacy consists in the use of that word "duty." If a duty to the Postmaster General be meant, that is true; but if a duty to the plaintiff be intended, (and in that sense the word is evidently used), there was none. This is one of those unfortunate cases in which there certainly has been *damnum*, but it is *damnum absque injuria*. It is no doubt a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has frequently been observed, are apt to introduce bad law.

Longmeid vs. Holliday, 6 Exchequer, 761 (1851).

The defendant, a dealer in lamps, sold to Mrs. Longmeid a lamp, to be used by her and her husband. While in use, the lamp exploded, injuring Mrs. Longmeid. This action was brought by Mr. and Mrs. Longmeid to recover damages for the sale of the lamp. There was evidence that the lamp was defectively constructed; but the defendant had not, himself, made it, and it did not appear that he had known of the defects or had personally been guilty of any misrepresentation or other fraud. *Held,* that the defendant was not liable.

Mr. Longmeid, suing alone and on the implied warranty that the lamp was sound, which was incident to the sale, had previously recovered damages as for the breach of that implied warranty.

PARKE, B.: There is no doubt that, if the defendant had been guilty of a fraudulent representation that the lamp was fit and proper to be used, knowing that it was not, and intending it to be used by the plaintiff's wife or any particular individual, the wife (joining her husband for conformity) or that individual would have had an action for the deceit, upon the principle on which all actions for deceitful representation are founded, and which was strongly illustrated in the case of Langridge vs. Levy, 2 M. & W. 519; in error, 4 M. & W. 337, viz, that if one knowingly tells a falsehood with intent to induce another to do an act which results in his loss, he is liable to that person in an action for deceit. But the fraud being negatived in this case, the action cannot be maintained on that ground by the party who sustained damage.

There are other cases, no doubt, besides those of fraud, in which a third person, though not a party to the contract, may sue for the damage sustained, if it be broken. These cases occur where there has been a wrong done to that person for which he would have had a right of action, though no such contract had been made. As, for example, if an apothecary administered improper medicines to his patient, or a surgeon unskillfully treated him and thereby injured his health, he would

be liable to the patient, even where the father or friend of the patient may have been the contracting party with the apothecary or surgeon; for, though no such contract had been made, the apothecary, if he gave improper medicines, or the surgeon, if he took him as a patient and treated him unskillfully, would be liable to an action for a misfeasance: Pippin vs. Sheppard, 11 Price, 40; Gladwell vs. Steggall, 8 Scott, 60; 5 Bing. N. C. 733. A stage-coach proprietor, who may have contracted with a master to carry his servant, if he is guilty of neglect and the servant sustains personal damage, is liable to him: for it is a misfeasance towards him if, after taking him as a passenger, the proprietor or his servant drives without due care, as it is a misfeasance towards any one travelling on the road. So, if a mason contract to erect a bridge or other work in a public road, which he constructs, but not according to the contract, and the defects of which are a nuisance to the highway, he may be responsible for it to a third person who is injured by the defective construction; and he cannot be saved from the consequences of his illegal act, in committing the nuisance on the highway, by showing that he was also guilty of a breach of contract, and responsible for it. And it may be the same when any one delivers to another without notice an instrument in its nature dangerous, or under particular circumstances, as a loaded gun which he himself loaded, and that other person to whom it is delivered is injured thereby, or if he places it in a situation easily accessible to a third person who sustains damage from it. A very strong case to that effect is Dixon vs. Bell, 5 M. & S. 198.

But it would be going much too far to say that so much care is required in the ordinary intercourse of life between one individual and another that, if a machine not in its nature dangerous—a carriage, for instance—but which might become so by a latent defect entirely unknown, although discoverable by the exercise of ordinary care, should be lent or given by one person, even by the person who manufactured it, to another, the former should be answerable to the latter for a subsequent damage accruing by the use of it. Could it be contended with justice in the present case that, if the lamp had been lent or given by the defendant to the plaintiff's wife, and used by her, he would have been answerable for the personal damage which she sustained, the defendant not knowing or having any reason to believe it was not perfectly safe, although liable to the party to whom he contracted to sell it upon an implied warranty that it was fit for use, so far as reasonable care could make it, for the breach of that contract as to all damage sustained by him?

We are of opinion, therefore, that, if there had been in this case a breach of contract with the plaintiffs, the husband might have sued for it, but there being no misfeasance towards the wife independently of the contract, she cannot sue and join herself with her husband. Therefore a non-suit must be entered.

Thomas vs. Winchester, 6 N. Y. 397 (1852).

In the establishment of Winchester, a manufacturing druggist in the city of New York, was put up a jar of the extract of belladonna, a poisonous drug, which was, by the negligence of an employee named Gilbert, labelled dandelion, which is harmless. This jar was sold as containing dandelion by Winchester to Aspinwall, a wholesale druggist in New York, and by the latter to Foord, a retail druggist at Cazenovia, where Mr. and Mrs. Thomas resided. Mrs. Thomas being in ill health, dandelion was prescribed for her, and Mr. Thomas bought from Foord the mislabelled jar. Some of the contents of this jar having been taken by Mrs. Thomas, she became violently and dangerously ill. After her recovery, she and her husband brought this action against Winchester to recover damages for his negligence in putting forth belladonna under the name of dandelion. It did not appear that either Aspinwall or Foord was aware of the nature of the drug sold by them or that either of them had been guilty of negligence. The defence was that Winchester was not liable to Mrs. Thomas because there had been no privity of contract between them, he having never contracted to sell her dandelion or anything else, and so having assumed no duty toward her. *Held,* however, that the defendant was liable by reason of his negligence in putting upon the market an article which was dangerous to life and of which the dangerous nature was not properly disclosed.

RUGGLES, C. J.: The question is whether, the defendant being a remote vendor of the medicine, and there being no privity or connection between him and the plaintiffs, the action can be maintained. If, in labelling a poisonous drug with the name of a harmless medicine, for public market, no duty was violated by the defendant, excepting that which he owed to his immediate vendee, in virtue of his contract of sale, this action cannot be maintained. If A builds a wagon, and sell it to B, who sells it to C, and C hires it to D, who, in consequence of the gross negligence of A in building the wagon, is overturned and injured, D cannot recover damages against A, the builder. A's obligation to build the wagon faithfully arises solely out of his contract with B. The public have nothing to do with it. Misfortune to third persons, not parties to the contract, would not be a natural and necessary consequence of the builder's negligence; and such negligence is not an act imminently dangerous to human life. So, for same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the

owner is thrown and injured in consequence of the smith's negligence in shoeing, the smith is not liable for the injury. The smith's duty in such case grows exclusively out of his contract with the owner of the horse. It was a duty which the smith owed to him alone, and to no one else. And, although the injury to the rider may have happened in consequence of the negligence of the smith, the latter was not bound, either by his contract or by any considerations of public policy or safety, to respond for his breach of duty to any one except the person he contracted with. This was the ground upon which the case of Winterbottom vs. Wright, 10 M. & W. 109, was decided. * * *

But this case stands on a different ground. The defendant was a dealer in poisonous drugs. Gilbert was his agent in preparing them for market. The death or great bodily harm of some person was the natural and inevitable consequence of the sale of belladonna by means of the false label. Gilbert, the defendant's agent, would have been punishable for manslaughter if Mrs. Thomas had died in consequence of taking the falsely labelled medicine. * * * A chemist who negligently sells laudanum in a phial labelled as paregoric, and thereby causes the death of a person to whom it was administered is guilty of manslaughter. Tessymond's Case, 1 Lewin, Cr. Cas. 169. * * * And this rule applies, not only where the death of one is occasioned by the negligent act of another, but where it is caused by the negligent omission of a duty of that other. Although the defendant, Winchester, may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal.

In respect to the wrongful and criminal character of the negligence complained of, this case differs widely from those put by the defendant's counsel. No such imminent danger existed in those cases. In the present case the sale of the poisonous article was made to a dealer in drugs, and not to a consumer. The injury, therefore, was not likely to fall on him or on his vendee, who also was a dealer, but much more likely to be visited on a remote purchaser, as actually happened. The defendant's negligence put human life in imminent danger. Can it be said that there was no duty on the part of the defendant to avoid the creation of that danger by the exercise of greater caution? or that the exercise of that caution was a duty only to his immediate vendee, whose life was not endangered? The defendant's duty arose out of the nature of his business, and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labelled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall. The wrong done by the defendant was in putting the poison, mislabelled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion, by some person then unknown. The owner of a horse and cart, who leaves them unattended in the street, is liable for any damage which may result from his negli-

gence: Lynch vs. Nurdin, 1 A. & Ellis, N. S., 29; Illidge vs. Goodwin, 5 C. & P. 190. The owner of a loaded gun, who puts it into the hands of a child, by whose indiscretion it is discharged, is liable for the damage occasioned by its discharge: 5 M. & S. 198 [Dixon vs. Bell]. The defendant's contract of sale to Aspinwall does not excuse the wrong done to the plaintiffs. It was a part of the means by which the wrong was effected. The plaintiffs' injury and their remedy would have stood on the same principle if the defendant had given the belladonna to Dr. Foord without price, or if he had put it in his shop without his knowledge, under circumstances which would probably have led to its sale on the faith of the label.

In Longmeid vs. Holliday, 6 L. & Eq. 562 [6 Exchequer, 761], the distinction is recognized between an act of negligence imminently dangerous to the lives of others, and one that is not so. In the former case, the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not: in the latter, the negligent party is liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract.

Savings Bank vs. Ward, 100 U. S. 195. Supreme Court of the United States (1879).

One Chapman had sold a lot in the city of Washington and the deed of conveyance was duly recorded in the registry of deeds. Afterwards, Chapman, intending to borrow money on this lot or on some other property, employed Ward, an attorney at law, to examine and certify to his title. Ward traced the title to the lot as far as Chapman, but overlooked the record of the deed by which Chapman had conveyed the land; and he certified that the title of Chapman to the lot was good and unincumbered. Chapman presented this certificate to the National Savings Bank; and on the faith of Ward's report, without causing other examination to be made, the bank lent to Chapman $3,500, taking as security for the loan a deed of trust on the lot. Chapman did not repay the loan, and, as the security was valueless, the bank lost the amount lent. There was no evidence of fraud on the part of Ward, nor did he have any knowledge as to the purpose for which his certificate was to be used, except to the extent that he might have surmised or inferred that purpose from the nature of his employment and general usage in such matters. Ward had not been employed or consulted in the matter by the bank, nor had there been any communication of

any kind on the subject between him and the bank. *Held,* that Ward was not liable to the bank for the consequences of his error, there having been no privity of contract between them, and this not being one of those cases in which a party is liable independently of contract relations for his negligence.

CLIFFORD, J.: Attorneys employed by the purchasers of real property to investigate the title of the grantor prior to the purchase impliedly contract to exercise reasonable care and skill in the performance of the undertaking, and if they are negligent, or fail to exercise such reasonable care and skill in the discharge of the stipulated service, they are responsible to their employers for the loss occasioned by such neglect or want of care and skill. * * * Like care and skill are also required of attorneys when employed to investigate titles to real estate to ascertain whether it is safe or sufficient security for a loan of money, the rule being that if the attorney is negligent or fails to exercise reasonable care and skill in the performance of the service, and a loss results to his employers from such neglect or want of care and skill, he shall be responsible to them for the consequences of such loss. Addison, Torts (Wood's ed), 615. * * * It is not pretended by the plaintiffs that they ever employed the defendant to examine the title to the lot, and it appears that the report was made at the sole request of the claimant of the lot, without any knowledge on the part of the defendant as to the purpose for which it was obtained. * * *

When a person adopts the legal profession, and assumes to exercise its duties in behalf of another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties; and if injury results to the client from a want of such a degree of reasonable care and skill, the attorney may be held to respond in damages to the extent of the injury sustained. Proof of employment and the want of reasonable care and skill are prerequisites to the maintenance of the action; but it must not be understood that an attorney is liable for every mistake that may occur in practice, or that he may be responsible to his client for every error of judgment in the conduct of the client's cause. Instead of that, the rule is that, if he acts with a proper degree of skill and with reasonable care to the best of his knowledge, he will not be held responsible: Bowman vs. Tallman, 27 How. (N.Y.) Prac. 212, 274. If he fails in any of these respects, he may, and sometimes does, not only forfeit all claim for compensation, but may also render himself liable to his client for any damage he may sustain from such neglect. * * *

Neither fraud nor collusion is alleged or proved; and it is conceded that the certificates were made by the defendant at the request of the applicant for the loan, without any knowledge on the part of the defendant what use was to be made of the same or to whom they were to be presented. None of these matters are controverted; but the plaintiffs contend that an attorney in such a case is liable to the immediate sufferer for negligence in the examination of such a title, although he,

the sufferer, did not employ the defendant, and the case shows that the service was performed for a third person without any knowledge that the certificate was to be used to procure a loan from the injured party.

Persons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients, may be regarded as attorneys at law within the meaning of that designation as used in this country; and all such, when they undertake to conduct legal controversies or transactions, profess themselves to be reasonably well acquainted with the law and the rules and practices of the courts, and they are bound to exercise in such proceedings a reasonable degree of care, prudence, diligence and skill. Authorities everywhere support that proposition; but attorneys do not profess to know all the law or to be incapable of error or mistake in applying it to the facts of every case, as even the most skillful of the profession would hardly be able to come up to that standard. Unless the client is injured by the deficiencies of his attorney, he cannot maintain any action for damages; but if he is injured, the true rule is that the attorney is liable for the want of such skill, care and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment.

Both parties concur in these suggestions; but the defendant insists that, in order that such a liability may arise, there must be some privity of contract between the parties to enable the plaintiffs to maintain the action; that, inasmuch as the defendant was never retained or employed by the plaintiffs, and never rendered any service at their request or in their behalf, he cannot be held liable to them for any negligence or want of reasonable care, skill, or diligence in giving to a third party the certificate in question.

Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained. Conclusive support to that rule is found in several cases of high authority. Fish vs. Kelly, 17 C. B. N. S. 194 [citing also Robertson vs. Fleming, 4 Macquean, H. of L. Cas. 167, 209]. * * *

Analogous cases involving the same principle are quite numerous, a few of which only will be noticed. They show to a demonstration that it is not every one who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, the limit of the doctrine relating to actionable negligence, says BEASLEY, C. J., is that the person occasioning the loss must owe a duty, arising from contract or otherwise, to the persons sustaining such loss. Such a restriction on the right to sue for a want of care in the exercise of employments or the transaction of business is plainly necessary to restrain the remedy from being pushed to an impracticable extreme. There would be no bounds to actions and litigious intricacies if the ill-effects of the negligence of men may be followed down the chain of results to the final effect: Kahl vs. Love, 37 N. J. L. 5, 8. [Citing also Winterbottom vs. Wright, 10 M. & W. 109.] * * *

Cases where fraud and collusion are alleged and proved constitute exceptions to that rule, and PARKE, B., very properly admits, in the following case, that other exceptions to it exist which are as sound in principle as the judgments which establish the rule: Longmeid vs. Holliday, 6 Exch. Rep. 761-767.

Examples of the kind are given in that case, two of which deserve to be noticed, as they have been urged in argument to disprove the rule; but they cannot have any such effect, for the plain reason that they stand in many respects upon a different footing. These cases, say the court in that opinion, occur where there has been a wrong done to the person for which he would have a right of action though no such contract had been made; and the court gives as an illustration the patient injured by improper medicines prepared by an apothecary, or one unskillfully treated by a surgeon, where both would be liable to the injured party even if the father or friend of the patient contracted with the wrongdoer. Reported cases of the kind are cited by the plaintiffs, but it is obvious that they have no proper application to the case before the court: Peppin and Wife vs. Sheppard, 11 Price, 400; Gladwell vs. Steggall, 5 Bing. N. C. 733; George vs. Skivington, L. R. 5 Exch. 1; P. & R. R. R. Co. vs. Derby, 14 How. 468, 484.

Many judicial decisions in this country besides those cited also adopt the same rule and fully recognize the same class of exceptions.

Pharmacists or apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labelled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such case arises, not out of any contract or direct privity between the wrongdoer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the label may have passed through many intermediate sales before it reached the hands of the person injured: Thomas vs. Winchester, 2 Selden (6 N. Y.), 410.

Such an act of negligence being imminently dangerous to the lives of others, the wrongdoer is liable to the injured party, whether there be any contract between them or not. Where the wrongful act is not immediately dangerous to the lives of others, the negligent party, unless he be a public agent in the performance of some duty, is in general liable only to the party with whom he contracted, and on the ground that negligence is a breach of the contract: Collis vs. Selden, L. R. 3 C. P. 496.

Builders of a public work are answerable only to their employers for any want of reasonable care and skill in executing their contract, and they are not liable to third persons for accidents and injuries which may happen to them from imperfections of the structure after the same is completed and has been accepted by the employers. The Mayor, etc., of Albany vs. Cunliff, 2 N. Y. 165, 174.

Misfortune to third persons not parties to the contract would not be a natural and necessary consequence of the builder's negligence, and

such negligence is not an act imminently dangerous to human life: Loop vs. Litchfield, 42 *id.* 351-358.

So, where the manufacturer of a steam-boiler sold it to a paper company, it was held that the seller was only liable to the purchaser for defective materials, or for want of care and skill in its construction; and if, after delivery to, and acceptance by, the purchaser, and while in use by him, an explosion occurs in consequence of such defective construction, to the injury of third persons, the latter will have no cause of action against the manufacturer. Losee vs. Clute, 51 *id.* 494-496.

Exactly the same rule prevails in the State of Pennsylvania, independent of any statutory regulation on the subject, the Supreme Court of that State holding that the liability of the recorder in such a case is to the party who asks and pays for the certificate, and not to his assigns and alienee: Houseman vs. Girard Mutual Building & Loan Association, 81 Pa. St. 256. * * *

The difficulty in the way of the plaintiffs is that they never employed the defendant to search the records, examine the title, or make the report, and it clearly appears that he never performed any such service at their request or in their behalf, and that they never paid him anything for the service he did perform in respect to that transaction; nor is there any evidence tending to show any privity of contract between them and the defendant, within the meaning of the law as expounded by the decisions of the court.

Every imputation of fraud is disclaimed, and it is clear that the transaction is not one immediately dangerous to the lives of others. Where there is fraud or collusion, the party will be held liable, even though there is no privity of contract; but where there is neither fraud or collusion nor privity of contract, the party will not be held liable, unless the act is imminently dangerous to the lives of others, or is an act performed in pursuance of some legal duty: Langridge vs. Levy, 2 M. & W. 519, 530.

WAITE, C. J., and SWAYNE and BRADLEY, JJ., dissented.

Huset vs. J. I. Case Threshing Machine Co., 120 Fed. Rep. 865. Circuit Court of Appeals, Eighth Circuit (1903).

The defendant was a corporation engaged in the manufacture of threshing rigs, which consisted of an engine, a separator, a band cutter, and a self-feeder. The band-cutter and self-feeder consisted of a series of fast revolving knives covered with a sheet-iron covering and a frame designed to fit into the front of the separator, in which the cylinder was located. When the machine was in operation, this cylinder revolved at a very high

rate of speed with great force. A sheet-iron covering was fitted over the front of this cylinder so that any one operating the machine could walk over this covering to the other parts of the machine. This sheet-iron covering was made without any support and was so pliable that it would bend under the weight of an ordinary man. To operate the machine it was necessary to stand upon this covering.

Huset was a field hand working for J. H. Pifer, who had purchased the machine directly of the defendant. In working about the machine Huset had no opportunity to perceive the dangerous nature of his position, as the covering hid the rotating knives. He undertook to walk over the covering, and it gave way under his weight, whereby he was let down upon the knives, sustaining injuries which resulted in the loss of his leg.

It was contended by the defendant that, as the plaintiff was a stranger to the transaction between the purchaser and the vendor, the latter owed to Huset no duty and therefore was not guilty of a breach of duty for which he could recover.

Held, that, as the defendant had, without giving notice of its character, delivered to another a machine which the vendor knew to be imminently dangerous to any one using it for the purpose for which it was intended, the company was liable to any one who sustained injury, whether it had any contractual relations with the injured person or not.

SANBORN, CIRCUIT JUDGE: Is a manufacturer or vendor of an article or machine which he knows, when he sells it, to be imminently dangerous, by reason of a concealed defect therein, to the life or limb of any one who shall use it for the purpose for which it was made and intended, liable to a stranger to the contract of sale for an injury which he sustains from the concealed defect while he is lawfully applying the article or machine to its intended use? * * * The decisions which have been cited are not entirely harmonious, and it is impossible to reconcile all of them with any established rule of law. And yet the underlying principle of the law of negligence, that it is the duty of every one to so act himself, and to so use his property, as to do no unnecessary damage to his neighbors, leads us fairly through the maze. If we contemplate the familiar rules, that every one is liable for the natural and probable effects of his acts; that negligence is a breach of a duty; that an injury that is the natural and probable consequence of an act of negligence is actionable, while one that could not have been foreseen or reasonably anticipated as the probable effect of such an act is not action-

able, because the act of negligence in such a case is the remote, and not the proximate, cause of the injury; and that, for the same reason, an injury is not actionable which would not have resulted except for the interposition of an independent cause: C. St. P. M. & O. R. R. Co. vs. Elliott, 55 Fed. 949.

Actions for negligence are for breaches of duty. Actions on contracts are for breaches of agreements. Hence the limits of liability for negligence are not the limits of liability for breaches of contract, and actions for negligence often accrue where actions upon contracts do not arise, and *vice versa*. * * * The general rule is that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the article he handles. * * * In the leading case of Winterbottom vs. Wright this rule is placed upon the ground of public policy. In that case the defendant had made a contract with the Postmaster General to provide and keep in repair the stage-coach used to convey the mail. The coach broke down, overturned and injured the driver, who sued the contractor for the injury resulting from his negligence.

LORD ABINGER, C. B., said:

"There is no privity of contract between these parties; and, if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action."

BARON ALDERSON said: "I am of the same opinion. * * * If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract."

The views expressed by the judges in this case have prevailed in England and in the United States, with the exception of two decisions which are in conflict with the leading case. They are Schubert vs. J. R. Clark Co., 49 Minn. 331, where a painter received injury through the negligent construction of a step-ladder; and Devlin vs. Smith, 89 N. Y. 470, where a painter was injured by the breaking of a scaffold, owing to the negligence of the contractor who built the scaffold for Devlin's employer. They are insufficient in themselves, or in the reasoning they contain, to overthrow or shake the established rule which prevails throughout the English-speaking nations.

But while this general rule is both established and settled, there are, as is usually the case, exceptions to it as well defined and settled as the rule itself. There are three exceptions to this rule.

The first is that an act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence. * * * The leading case upon this subject is Thomas vs. Winchester, 6 N. Y. 397. A dealer in drugs sold to a druggist a jar of belladonna, a deadly poison, and labelled it "Extract of Dandelion." The druggist filled a prescription of extract of

dandelion, prepared by a physician for his patient. The patient took the prescription thus filled, and recovered of the wholesale dealer for her injuries. In Norton vs. Sewall, 106 Mass. 143, a recovery was had by a third party for the sale of laudanum as rhubarb; in Bishop vs. Weber, 139 Mass. 411, for the furnishing of poisonous food for wholesome food; in Peters vs. Johnston (W. Va.), 41 S. E. 190, for the sale of saltpetere for epsom salts; and in Dixon vs. Bell, 5 Maule & Sel. 198, for placing a loaded gun in the hands of a child. * * * It was the natural and probable result of the negligence in these cases that the vendees would not suffer, but that those who subseqently purchased the deleterious articles would sustain the injuries resulting from the negligence of the manufacturers or dealers who furnished them.

The second exception is that an owner's act of negligence which causes injury to one who is invited by him to use his defective appliance upon the owner's premises may form the basis of an action against the owner. In Coughtry vs. Globe Woolen Co., 56 N. Y. 124, the owner of a building employed Osborn & Martin to construct a cornice, and agreed with them to furnish a scaffold upon which their men could perform the work. He furnished the scaffold, and one of the employés of the contractor was injured by the negligence of the owner in constructing the scaffold. The court held that the act of the owner was an implied invitation to the employés of Osborn & Martin to use the scaffold, and imposed upon him a liability for negligence in its erection.

The third exception to the rule is that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not. In Langridge vs. Levy, 2 M. & W. 519, a dealer sold a gun to the father for the use of the son, and represented that it was a safe gun and made by one Nock. It was not made by Nock, was a defective gun, and when the son discharged it, it exploded and injured him. The son was permitted to recover. * * * The court said: "We therefore think that, as there is fraud and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured." In Wellington vs. Oil Co., 104 Mass. 64, the defendants knowingly sold to one Chase, a retail dealer, to be sold by him to his customers as oil, naphtha, a dangerous and explosive liquid. Chase sold the naphtha as oil, the plaintiff used it in a lamp for illuminating purposes, it ignited and exploded, and he recovered of the wholesale dealer. In Farrant vs. Barnes, 11 C. B. N. S. 553, a person who delivered a carboy, which he knew contained nitric acid, to a carrier, without informing him of the nature of the contents, was held liable for an injury occasioned by the leaking of the acid upon another carrier, who received the article in the regular course of business. * * * Turn now to the case in hand . . . it falls fairly within the third exception, * * * that when one delivers an article, which he knows to be dangerous to another person, without notice of its nature and

qualities, he is liable for an injury which may be reasonably contemplated as likely to result, and which does in fact result therefrom, to that person or to any other who is not himself in fault. * * * The act of delivering it to the purchaser with a knowledge and a concealment of its dangerous condition was so flagrant a disregard of the rule that one is bound to avoid any act imminently dangerous to the lives and health of his fellows that it forms the basis of a good cause of action in favor of any one who sustained injury therefrom.

State, to the use of Hartlove, vs. Fox, 79 Md. 514 (1894).

Fox & Son, dealers in horses, sold to one Hartlove a mare which was infected with glanders, a disease which is generally fatal to quadrupeds, and which is communicable to human beings, to whom also it is very dangerous. The dealers knew the mare's condition, and explained it to the purchaser by saying that the disorder was a heavy cold. A brother of the purchaser was asked to treat the animal, and in so doing he contracted the disease and died therefrom.

This action was brought on behalf of the widow and children of the deceased Hartlove against the vendors of the mare on the ground that they were, by reason of the sale and the attendant deceit, liable for the death. The defence was that Fox & Son had neither contracted with the deceased nor made to him any false representations. The plaintiffs prevailed, the court holding that the defendants, in selling the mare in a condition which made her imminently dangerous to human life, were guilty of a breach of duty toward any one who might be injured thereby.

Duty to Insure.

Dixon vs. Bell, 5 M. & S. 198. King's Bench (1816).

The plaintiff and the defendant lodged at the house of one Leman, where the defendant kept a loaded gun. Having left the house, the defendant sent his servant, a girl about thirteen years of age, to fetch the gun, with a message requesting Leman to take out the priming and send the gun by the girl. Leman took out the priming and delivered the gun to the girl. She set it down in the kitchen, and afterwards took it up and presented it in play at the plaintiff's son, a child between eight and nine years of age. The girl drew the trigger and the gun went off, severely injuring the boy. This action was brought by Dixon to recover for the loss of his son's services and the expense of medical treatment for him. The plaintiff was allowed to recover.

LORD ELLENBOROUGH, C. J.: The defendant might and ought to have gone farther; it was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing of the contents; and, though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated by taking out the priming, the event has unfortunately proved that the order to Lemon was not sufficient. Consequently, as by this want of care the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible. It is a hard case, undoubtedly; but I think the action is maintainable.

BAYLEY, J.: The gun ought to have been so left as to be out of all reach of doing harm. The mere removal of the priming left the chance of some grains of powder escaping through the touch-hole.

May vs. Burdett, 9 Q. B. 101. Queen's Bench (1846).

The declaration alleged that the defendant "kept a certain monkey, he the defendant well knowing that the said monkey was of a mischievous and ferocious nature, and was used and accustomed to attack and bite mankind, and that it was dangerous and improper to allow the said monkey to be at large and unconfined," and that the monkey bit the plaintiff, a woman, causing her severe injuries.

After verdict for the plaintiff, it was moved in arrest of judgment on the ground that the declaration did not allege that the defendant had been negligent in his keeping of the monkey, and that the plaintiff's case assumed that the defendant was liable for any act of the monkey although the defendant had been without fault.

Held, that the declaration was sufficient, it not being necessary to allege or prove negligence in such a case.

LORD DENMAN, C. J.: A great many cases and precedents were cited upon the argument; and the conclusion to be drawn from them appears to us to be that the declaration is good upon the face of it: and that whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping the animal after knowledge of its mischievous propensities. * * *

It was said, indeed, further on the part of the defendant that, the monkey being an animal *ferae naturae*, he would not be answerable for injuries committed by it if it escaped and went at large without any

default on the part of the defendant, during the time it had so escaped and was at large, because at that time it would not be in his keeping nor under his control: but we cannot allow any weight to this objection: for, in the first place, there is no statement in the declaration that the monkey had escaped, and it is expressly averred that the injury occurred whilst the defendant kept it: we are, besides, of opinion, as already stated, that the defendant, if he would keep it, was bound to keep it secure at all events.

Fletcher vs. Rylands, et al. In the Exchequer (1865). 3 Hurlstone and Coltman, 774. In the Exchequer Chamber (1866). L. R. 1 Ex. 265. In the House of Lords, *sub nomine,* **Rylands et al., vs. Fletcher** (1868). L. R. 3 H. L. 330.

The defendants were the owners of a mill; in order to supply it with water they constructed upon the nearby land of LORD WILTON, with his permission, a reservoir. The plaintiff under lease from LORD WILTON was working certain coal mines under land close to but not adjoining the premises on which the reservoir was constructed. They worked their mine in the direction of the reservoir until they came upon certain old workings, part of which at least had been made and abandoned at a time beyond living memory. These consisted of horizontal passages and vertical shafts, the latter apparently filled with rubbish and marl similar to that of the solid earth surrounding them. The defendant employed a competent engineer to plan and construct the reservoir, and it was so planned and constructed solely by them upon a site, in the choice of which the defendants were guilty of no personal fault, though in fact the above mentioned old workings lay beneath it and, continuing under the intermediate lands, communicated, at the point to which the plaintiff had pushed his workings in that direction, with the workings of the plaintiff. The contractors in excavating for the bed of the reservoir came upon five of the above mentioned vertical shafts; the sides or walls of some of these were of timber, but, being filled with soil of the same kind as that composing the surrounding ground, neither the contractors, nor the defendants suspected that they were abandoned mine shafts. The arbitrator found that the defendants were guilty of no per-

sonal negligence or fault, but that the engineer and contractors had not in fact exercised proper care, with reference to the shafts discovered, to provide for the sufficiency of the reservoir to bear the pressure which it was designed to bear when in use. The reservoir was completed early in December, 1860, when the defendants had it partly filled. Within a few days, one of the shafts, which had been met while excavating, gave way and burst downward, letting the water into the old abandoned workings beneath, through which it flowed, through the communications which the plaintiff in working his mine had made between the two, into the plaintiff's workings, flooding his mine.

Fletcher brought this action against the mill-owners to recover damages for the flooding of his mine. The defence was that the defendants had not, personally, been guilty of negligence in the construction of their reservoir or in the choice of its site, that they had done no more than to use their land in a proper and legitimate way, that they had employed a competent engineer and competent contractors, and that the escape of the water was, as to them at least, an inevitable accident. This view of the case was accepted by the Court of Exchequer and judgment there was rendered for the defendants.

This judgment was reversed by the Court of the Exchequer Chamber, the first appellate tribunal; and afterwards, the case being brought before the House of Lords, the judgment of the Exchequer Chamber was affirmed. The defendants were, therefore, held liable upon the facts shown in this case, the theory of the decision being that, having brought a dangerous article upon their land, they were bound to insure against its escape. The opinions quoted below were delivered in the House of Lords.

THE LORD CHANCELLOR (LORD CAIRNS): My Lords, in this case the plaintiff (I may use the description of the parties in the action) is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighborhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although in point of fact some intervening land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were certain old and disused mining

passages and works. There were five vertical shafts and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish, and it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally, the defendants appear to have taken no part in the works, or to have been aware of any want of security connected with them. As regards the engineer and contractor, we must take it from the case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, my Lords, when the reservoir was constructed and filled, or partly filled with water, the weight of the water bearing upon the disused and imperfectly filled-up vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings, and from the horizontal workings under the close of the defendants it passed on into the workings under the close of the plaintiff, and flooded his mine, causing considerable damage for which this action was brought.

My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of the land to be used; and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the law of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, the case of *Smith vs. Kenrick*, in the Court of Common Pleas, 7 C. B. 515 (E. C. L. R. vol. 62).

On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off

into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the plaintiff and injuring the plaintiff, then for the consequence of that, in my opinion, the defendants would be liable.

As the case of *Smith vs. Kenrick* is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same Court, the case of *Baird vs. Williamson*, 15 C. B. N. S. 317 (E. C. L. R. vol. 109), which was also cited in the argument at the Bar.

My Lords, these simple principles, if they are well founded, as it appears to me they are, really dispose of this case.

The same result is arrived at on the principles referred to by MR. JUSTICE BLACKBURN in his judgment in the Court of Exchequer Chamber, where he states the opinion of that Court as to the law in these words: "We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

My Lords, in that opinion I must say that I concur entirely. Therefore, I have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH: My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by MR. JUSTICE BLACKBURN in delivering the opinion of the Exchequer Chamber. If a person brings, or accumulates, on his land anything which,

if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.

In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of *Lambert vs. Bessey*, reported by Sir Thomas Raymond (Sir T. Rym. 421). And the doctrine is founded on good sense. For when one person, in managing his own affairs, causes,. however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non laedat alienum.* This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two modern cases in the Court of Common Pleas referred to by my noble and learned friend. I allude to the two cases of *Smith vs. Kenrick, supra*, and *Baird vs. Williamson, supra.* In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in his workings. The water in that case was only left by the defendant to flow in its natural course.

But in the later case of *Baird vs. Williamson*, the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up quantities of water which passed into the plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skillfully or unskillfully performed, that the plaintiff had been damaged, and he was therefore held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God; in the latter, from the act of the defendant.

Applying the principle of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work

his coal through the lands of Mr. Whitehead and up to the old workings. If water naturally rising in the defendant's land (we treat the land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings, and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the plaintiff, he would have done no more than he was entitled to do; for, according to the principle acted on in *Smith vs. Kenrick*, the person working the mine under the close in which the reservoir was made had a right to win and carry away all the coal without leaving any wall or barrier against Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage to the plaintiff, and for that damage, however skillfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible.

I concur, therefore, with my noble and learned friend, in thinking that the judgment below must be affirmed, and there there must be judgment for the defendant in error.

Nichols vs. Marsland, L. R. 10 Exch. 255. Exchequer (1875). Affirmed L. R. 2 Ex. Div. 1 (1876).

The defendant had upon her land three artificial lakes, which were made by diverting water from a neighboring stream, and which were designed for ornament of her estate. These had existed for many years, and from a time before Mrs. Marsland acquired the property, and the scheme and construction of the lakes were sufficient to render them safe in all ordinary conditions of weather, and even against the effect of any such extraordinary storms as could reasonably be expected and provided against. As Mr. Shirley puts it, they "had always borne the character of being sober, respectable, well behaved lakes." In 1872, however, there came a rainstorm of unprecedented violence, such as no living inhabitant of the region could remember, and the extraordinary volume of water precipitated caused the lakes to burst and destroy their banks, and so to swell the stream by which they found outlet that several bridges built by the county were swept away. Nichols, who was the surveyor for the county, brought this action against Mrs. Marsland to recover

damages on behalf of the county for the destruction of the bridges. The plaintiff relied upon the doctrine laid down in Fletcher vs. Rylands, L. R. 3 H. L. 330, in 1868, insisting that in this case as in that the defendant had brought upon her land dangerous material, for the escape of which she should be held liable; or, in other words, that she was in the same position with one who keeps a mischievous animal with knowledge of its propensities, and is therefore responsible for damage done by the animal without regard to the existence of negligence. It was, however, held that this case was not within the principle of Fletcher vs. Rylands, but rather one in which the defendant was not liable except for negligence, and was excusable because the damage done was the result of *vis major* or the act of God.

The opinion in the Court of Exchequer, from which an extract is made below, was delivered by Bramwell, B. On appeal the judgment there rendered was affirmed by the Court of Appeal.*

BRAMWELL, B.: In this case I understand the jury to have found that all reasonable care had been taken by the defendant, that the banks were fit for all events to be anticipated, and the weirs broad enough; that the storm was of such violence as to be properly called the act of God, or *vis major*. No doubt, as was said by Mr. McIntyre, a shower is the act of God as much as a storm; so is an earthquake in this country; yet every one understands that a storm, supernatural in one sense, may properly, like an earthquake in this country, be called the act of God, or *vis major*. No doubt not the act of God or a *vis major* in the sense that it was *physically* impossible to resist it, but in the sense that it was practically impossible to do so. Had the banks been twice as strong, or if that would not do, ten times as high, and the weirs ten times as wide, the mischief might not have happened. But those are not practical conditions, they are such that to enforce them would prevent the reasonable use of property in the way most beneficial to the community. * * *

*"Nichols vs. Marsland engrafts on the rule of Fletcher v. Rylands, the qualification that, although a man brings on his land what will do damage if it escapes, still he is not responsible if the escape is due to causes beyond his own control, and amounting to *vis major;* and in the later case of Box vs. Jubb [4 Ex. D. 76], the same court held that, for the wrongful act of a third party which set the damage in motion, the proprietor was no more responsible than for *vis major*. Moreover, a man who brings water upon his land in an ordinary reasonable and proper mode of enjoying his land, is only liable for an escape which is attributable to negligence. Thus, in Ross vs. Fedden [L. R. 7 Q. B. 661], it was held that the occupier of an upper floor, who had not been in any way negligent, was not liable to the occupier of a lower for the leakage of water from a water closet of which he had the exclusive use": Shirley, L. C. 257.

So understanding the finding of the jury, I am of opinion the defendant is not liable. * * * She has done nothing wrong, she has infringed no right. It is not the defendant who let loose the water and sent it to destroy the bridges. She did indeed store it, and store it in such quantities that, if it was let loose, it would do, as it did, mischief. But suppose a stranger let it loose, would the defendant be liable? If so, then if a mischievous boy bored a hole in a cistern in any London house, and the water did mischief to a neighbor, the occupier of the house would be liable. That cannot be. Then why is the defendant liable if some agent over which she has no control lets the water out? Mr. McIntyre [counsel for the plaintiff] contended that she would be in all cases of the water being let out, whether by a stranger or the Queen's enemies, or by natural causes, as lightning or an earthquake. Why? What is the difference between a reservoir and a stack of chimneys for such a question as this? Here the defendant stored a lot of water for her own purposes; in the case of the chimneys some one has put a ton of bricks fifty feet high for his own purposes; both equally harmless if they stay where placed, and equally mischievous if they do not. The water is no more a wild or savage animal than the bricks while at rest, nor more so when in motion; both have the same property of obeying the law of gravitation. Could it be said that no one could have a stack of chimneys except on the terms of being liable for any damage done by their being overthrown by a hurricane or an earthquake? If so, it would be dangerous to have a tree, for a wind might come so strong as to blow it out of the ground into a neighbor's land, and cause it to do damage; or a field of ripe wheat which might be fired by lightning and do mischief.

I admit that it is not a question of negligence. A man may use all care to keep the water in, or the stack of chimneys standing, but would be liable if through any defect, though latent, the water escaped or the bricks fell. But here the act is that of an agent he cannot control. This case differs wholly from Fletcher vs. Rylands. There the defendant poured water into the plaintiff's mine. He did not know he was doing so; but he did it as much as though he had poured it into an open channel which led to the mine without his knowing it. Here the defendant merely brought it to a place whence another agent let it loose. I am not sure that the likeness of a wild animal is exact. I am by no means sure that, if a man kept a tiger, and lightning broke his chain and he got loose and did mischief, the man who kept it would not be liable. But this case and the case I put of the chimneys are not cases of keeping a dangerous beast for amusement, but of the reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case. Water stored in a reservoir may be the only practical mode of supplying a district and so adapting it for habitation. * * * I repeat that here the plaintiff has no right that has been infringed, and the defendant has done no wrong.

Liability for Condition of Premises.

Southcote vs. Stanley, 1 H. & N. 247. Exchequer (1856)

Stanley kept a hotel, which he invited and permitted Southcote to enter, not as a customer, but as a visitor. In a door in the house was a large and heavy pane of glass, which was loose and insecure. As Southcote opened this door, the glass fell out and cut him severely. He sued Stanley, assuming that it was the duty of the latter to keep his premises in a safe condition for all persons who might come thither by his invitation. The court held, however, that the defendant was not liable to the plaintiff, since Southcote had come merely as a guest and in a character which imposed upon Stanley no obligation to have his house in any particular degree of safety.

POLLOCK, C. B.: The position, that an action lies because the plaintiff was lawfully in the house, cannot be supported: a servant is lawfully in his master's house, and yet, if the balusters fell, whereby he was injured, he could not maintain an action against the master. If a lady, who is invited to dinner, goes in an expensive dress, and a servant spills something over her dress, which spoils it, the master of the house would not be liable. Where a person enters a house by invitation, the same rule prevails as in the case of a servant. A visitor would have no right of action for being put in a damp bed, whereby he caught cold.

ALDERSON, B.: The case of a shop is different, because a shop is open to the public; and there is a distinction between persons who come on business and persons who come by invitation.

BRAMWELL, B.: Where a person is in the house of another, either on business or for any other purposes, he has a right to expect that the owner of the house will take reasonable care to protect him from injury; for instance, that he will not allow a trap-door to be open, through which the visitor may fall. But, in this case, my difficulty is to see that the declaration charges any act of commission. If a person asked another, to walk in his garden, in which he had placed spring-guns or man-traps, and the latter, not being aware of it, was injured, that would be an act of commission. But if a person asked a visitor to sleep at his house, and the former omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action, for there was no act of commission, but simply an act of omission. This declaration merely alleges that "by and through the mere carelessness, negligence, default and improper conduct of the defendant," the glass fell from the door. That means a want of care—a default in not doing something.

Benson vs. Baltimore Traction Company, 77 Md. 535 (1893).

Upon the request of the principal of a manual training school, the defendant company permitted the graduating class of the school, of which the plaintiff was a member, to visit the company's power house. In going through the building, the plaintiff fell into a vat of boiling water and was severely scalded. The vat was wholly unguarded, and the place of the accident was dimly lighted, and no warning against the danger of the situation had been given to the plaintiff.

Held, that the company was not liable to the plaintiff for its failure to guard the vat and warn him of its existence, since he was a mere licensee coming upon the premises and must take conditions as he found them.

ROBERTS, J.: The authorities appear to have classified the subject under three heads, to wit:

1. Bare licensees or volunteers;

2. Those who are expressly invited or induced by the active conduct of the defendant to go upon the premises;

3. Customers and others who go there on business with the occupier. * * *

There ought to be no controversy in this case as to the object which the appellant had in seeking admission to the power-house of the appellee. It certainly was not for the benefit of the appellee that the visit was made, but it was clearly a mere license from the appellee, assenting to the visit. * * * MR. CHIEF JUSTICE BIGELOW, in Sweeny vs. Old Colony Railroad Co., 10 Allen, 372, says: "In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled. This is the basis on which the cause of action rests. There can be no fault or negligence or breach of duty where there is no act or service or contract, which a party is bound to perform or fulfill. * * * So a licensee who enters on premises by permission only, without any enticement, allurement or inducement . . . goes there at his own risk and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the plan for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon."

Hounsell vs. Smyth, 7 C. B. N. S. 731. Common Pleas (1860).

The defendant owned a large tract of waste land, lying between two public roads. The tract was uninclosed and open to the public, and all persons having occasion to cross and pass over the land had been used and accustomed to go over the same without objection on the part of the defendant and with his implied leave and license. Within this tract, and at a considerable distance from either of the two roads, was a quarry, which was worked by the authority of the defendant, and which was entirely unguarded. On a dark night the plaintiff accidentally strayed from one of the roads, wandered over the open ground of the defendant, and fell into the quarry, of the existence of which he had been ignorant. The plaintiff brought this action, his declaration setting out the facts substantially as stated above, and proceeding upon the theory that the defendant was, by reason of those facts, under a legal duty to keep the quarry so guarded that the vacant tract should be safe for those licensed to pass over. On demurrer to the declaration it was held that the case as stated by the plaintiff did not entitle him to recover.

WILLIAMS, J.: Now, it is not alleged that the quarry adjoined the public highway, but that it was situate near to and between two public highways leading over the waste, and that it was "dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from one road to another." It seems to me that, under these circumstances, the law imposes no duty upon the proprietors of the waste to fence the quarry, nor does it render them responsible to persons who may deviate from one or other of the roads and stray upon the waste. The law as to this was long ago settled in Blyth vs. Topham, Cro. Jac. 158 [A. D. 1607], which has been confirmed and acted upon in many cases. It was there held that, if A, seised of a waste adjacent to a highway, digs a pit within thirty-six feet of the highway, and the mare of B escapes into the waste and falls into the pit, and dies there, yet B shall not have an action against A; because the making of the pit in the waste, and not in the highway, was not any wrong to B, but it was the default of B himself that his mare escaped into the waste. The authority of that case is confirmed by the distinction drawn by this court in Barnes vs. Ward, 9 C. B. 362, and pointed out by the Court of Exchequer in Hardcastle vs. The South Yorkshire Railway Company, 4

H. & N. 67. The general doctrine as to the non-liability of owners of land to fence excavations therein was qualified to this extent by those amongst other cases, that the excavation must not be made so near to a public road as to amount to a public nuisance, and that, if it do amount to a public nuisance, and a particular injury result therefrom to an individual, an action will lie—on the well established principle of law, that, where a particular injury results from a public nuisance, it is the subject of compensation in damages to the individual by whom such injury is sustained. The allegation here amounts to no more than this, that there was a pit or quarry upon the waste somewhere between two public roads—not so near to either as to constitute a public nuisance, but so near as to be dangerous, not to persons passing along either of the public ways, but to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from one road to another. This state of things clearly gives no right of action, unless it be shown that the excavation is so near to the road as to amount to a public nuisance. * * *

Then, how is the case altered by the introduction of the allegation "that all persons having occasion to cross or pass over the said waste land have been used and accustomed to go upon, along and across the same, without interruption or hindrance from, and with the license and permission of, the owners of such waste land"? No right is alleged; it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint—that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and it may be, perils. Suppose the owner of land near the sea gives another leave to walk on the edge of the cliff; surely it would be absurd to contend that such permission cast upon the former the burthen of fencing. Can it make any difference that there is a public highway open to, but at some distance from, the cliff?

A resemblance has been suggested between this case and that of Corby vs. Hill, 4 C. B. N. S. 556; but there is really no analogy between them. In that case, the defendant held out an inducement to persons to come upon the land, by permitting it to be used as the means of access to his house, and therefore he was bound to warn persons so using the road of the obstruction which had been placed there. The principle upon which that case was decided very closely approximates to that which is stated in Barnes vs. Ward. All that can be said in this case is that the plaintiff had a tacit permission to cross the waste. It was not the fault of the defendants that he was ignorant of the existence and locality of the quarry, and of the danger he incurred by crossing the same in the dark.

KEATING, J.: In Barnes vs. Ward, the excavation was so near the public footway as to interfere with the rights of the public, and so was a public nuisance. The relative rights of the public and of the owner

of the land are thus dealt with by POLLOCK, C. B., in Hardcastle vs. The South Yorkshire Railway Company, 4 H. & M. 67, 74: "When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected by a sudden giddiness, or, in the case of a horse or carriage-way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off the road on a dark night and losing his way may wander to any extent; and, if the question [of the landowner's liability] be for the jury, no one could tell whether he was liable for the consequences of his act upon his own land or not. We think that the proper and true test of legal liability is, whether the excavation be substantially adjoining the way; and it would be very dangerous if it were otherwise—if in every case it was to be left as a fact to the jury whether the excavation were sufficiently near to the highway to be dangerous. When a man dedicates a way to the public, there does not seem any just ground, in reason and good sense, that he should restrict himself in the use of his land adjoining to any extent, further than that he should not make the use of the way dangerous to the persons who are upon and using it. To do so would be derogating from his grant. But he gives no liberty or license to the persons using the way to trespass upon his adjoining land; and if they come to misfortune, we think they must bear it, and the owner of the land is not responsible."

So, here, I think, that, to throw upon the owners the obligation of fencing this excavation in their waste land adjoining the roads, it ought to be shown that the excavation was so near to the roads as to be dangerous to persons lawfully using them. There is no obligation cast upon the owner of land to fence a pit or excavation which is dangerous only to those who deviate from the road and so become trespassers.

Barnes vs. Ward, 9 C. B. 392. Common Pleas (1850).

The defendant was building some new houses on lots abutting upon a street, and had dug an area immediately adjoining the street. This excavation being unguarded, the plaintiff's wife fell into it while passing along the street on a dark night, and was killed. This action was brought under LORD CAMPBELL'S Act, and the defendant was held liable.

Corby vs. Hill, 4 C. B. N. S. 556. Common Pleas (1858).

A lunatic asylum and the residence of the superintendent thereof stood at some distance from the highway, and were reached by a private road over which persons having business at the asylum or with the superintendent were licensed to pass. The defendant, a builder, was employed to make some repairs upon the asylum, and obtained from the

owners of the land leave to stack certain slates and other materials upon a portion of the private way. He neglected to mark the location of the pile by a light; and, on a dark night, the plaintiff's horse, driven by the plaintiff's servant, ran against the slates and was seriously injured by them.

Held, that the defendant was liable for the injury to the horse.

Hardcastle vs. Railway Company, 4 H. & N. 67. Exchequer (1859).

The defendants were the proprietors of the River Dun Navigation, in connection with which they maintained a canal. An ancient footpath led along the side of the canal for about 300 yards to a certain point where it was bounded on one side by a lock, and on the other by a small cutting or by-wash for passing the surplus water. At this point the path turned to the right, crossed the by-wash by means of a bridge, and proceeded on to Sheffield. A person continuing straight on in the direction of the footpath, and not turning to go over the bridge, would find himself upon a grassy plot of ground, about five yards long by seven broad, between the lock and the by-wash, level with the footway, unfenced, and having a fall of about three yards to the water. On a certain night, Hardcastle, the husband of the plaintiff in this action, started to walk by this path to Sheffield. On the next morning his body was found in the by-wash. It seemed that he had failed to turn at the bridge, but had proceeded straight ahead across the grassy plot and fallen into the water. *Held*, that the defendant company was not liable for his death, the deceased having become a trespasser upon the company's land before he was injured.

Maenner vs. Carroll, 46 Md. 193 (1876).

The defendants owned a large tract of vacant and unenclosed land lying within the limits of the city. People living in the neighborhood had for sometime been in the habit of crossing this tract, the owners having never given to any one express permission to do so, but having never objected to such use of their land. At length a street was projected through the tract, and an excavation was made toward the construction of the street. Maenner undertook, on a dark night, to cross the land, as he had been accustomed to do, and he fell into the excavation, sustaining personal injuries. He sued the defendants on account of his accident, contending that the circumstances imposed upon them the duty to keep their premises in safe condition for those who might lawfully enter upon the land.

Held, that the plaintiff, being only a licensee in the use of the premises, was not entitled to insist that the defendants should keep their property in any particular condition for his benefit, and that he could not recover.

Mergenthaler Company vs. Kirby, 79 Md. 182 (1894).

The company was engaged in the manufacture of typesetting machines, and its factory was in a part of the city devoted to similar industry The factory was surrounded on three sides by a fence, but was open on the fourth. Kirby, a boy of twelve, with two companions of about the same age, went upon the premises for the purpose of stealing lead scrap, which was collected and placed in a box near the factory wall. Their coming upon the place was unknown to, and not sanctioned by, the company or any of its agents. To approach the scrap-box it was necessary to pass the engine room, and though there was sufficient space to pass behind an exhaust pipe, which projected from the wall of the engine room, the boys undertook to cross in front of it. The engineer had no knowledge of their presence, and as they were passing he blew off the boiler to reduce the pressure, and a jet of boiling water and steam struck Kirby and scalded him. The boy brought this action against the company, claiming damages for what was assumed to be the negligence of the engineer in letting off the steam.

It was held that, as the plaintiff was a trespasser upon the company's property, the latter was under no duty to provide for his safety; and, since there was no evidence that the engineer had intentionally injured the boy, the defendant was not liable.

With respect to the qualification of the general rule on this subject obtaining in cases of injury sustained by trespassing children, the court observed that in this instance the boy was not only a trespasser, but a thief, although perhaps too young to appreciate the criminal quality of his act; and it was held that, on this account, the duty of the company toward the plaintiff was not, by reason of his tender years, enhanced as it might have been in the case of some other youthful trespasser.

Indermaur vs. Dames, L. R. 2 C. P. (1867). Common Pleas (1867).

Dames owned a sugar refinery, and employed one Duckham, a gas engineer, to make some alterations in a gas-meter installed in the refinery. The work having been done by Duckham, it was arranged that the meter should be inspected a few days later to see whether it worked properly. Accordingly, in the following week, the plaintiff, who was in the employ of Duckham, was sent by him to inspect the meter. In the floor, upon which the meter was placed, was an opening through which sugar was brought up and let down, and which was not fenced or otherwise adequately guarded. Indermaur, in going to the meter, fell through this hole, and sustained severe injuries, on account of which he brought this action. The defence was that,

in visiting the refinery, the plaintiff was a mere licensee, and that, therefore, the defendant owed to him no duty to keep the premises in any particular condition of safety.

Held, that the plaintiff was not a mere licensee, but a person coming upon business which concerned the defendant, and that the latter was bound to see that the plaintiff was not exposed to any unnecessary and unreasonable danger from the condition of the premises.

WILLES, J.: It was argued that the plaintiff was at best in the condition of a bare licensee or guest who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the color of ingratitude, so long as there is no design to injure him: See Hounsell vs. Smyth, 7 C. B. N. S. 371 (E. C. L. R. vol. 97), 29 L. J. (C. P.) 203. We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment, and that of a person testing the work which he had stipulated with the defendant to be paid for if it stood the test; whereby impliedly the workman was to be allowed an onstand to apply the test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety, seems equally to exist during the accessory employment of testing; and any duty to provide for the safety of the master workman, seems equally owing to the servant workman whom he may lawfully send in his place. It is observable, that, in the case of Southcote vs. Stanley, 1 H. & N. 247; 25 L. J. (Ex.) 339, upon which much reliance was properly placed for the defendant, ALDERSON, B., drew the distinction between a bare licensee and a person coming on business, and BRAMWELL, B., between active negligence in respect of unusual danger known to the host and not to the guest, and a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of. * * * The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trapdoor

left open, unfenced, and unlighted: Lancaster Canal Company vs. Parnaby, 11 Ad. & E. 233 (E. C. L. R. vol. 39), 3 P. & D. 162; *per cur.*, Chapman vs. Rothwell, E. B. & E. 168 (E. C. L. R. vol. 96), 27 L. J. (Q. B.) 315, where Southcote vs. Stanley, 1 H. & N. 247, 25 L. J. (Ex.) 339, was cited, and the LORD CHIEF JUSTICE, then ERLE, J., said: "The distinction is between the case of a visitor (as the plaintiff was in Southcote vs. Stanley), who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendant." This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And, if a customer were, after buying goods to go back to the shop in order to complain of the quality, or that the charge was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master. The class to which the customer belongs includes persons who go, not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And, with respect to such visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

Bennett vs. Louisville and Nashville Railroad Company, 102 U. S. 577. Supreme Court of the United States (1880).

The line of the railroad company touched the Tennessee River at the village of Danville in Tennessee. On this river another corporation operated a number of steamboats, and through tickets were sold by each company available for use on the trains and boats of either. The boats landing at Danville used a wharf belonging to the railroad company and which had been acquired by that company for the purpose of facilitating

that portion of its business consisting of traffic coming or going by the river. Adjacent to the wharf, the railroad company had built a large shed, about 240 feet long, for the storage of freight and trans-shipment thereof to the boats; and, in this shed, was some machinery used for the transfer of freight between trains and boats. For the purpose of operating this machinery, four open spaces or hatches, were made in the floor of the shed. The only convenient, or practically available, means of transit from the trains to the boats was by a plank-walk, which had been constructed by the railroad company, which led from the station to the wharf, and which passed through the shed.

Bennett came to Danville by a train of the defendant company, intending to take a boat on the river, though he had bought only a railway ticket to Danville. He had waited for a few hours at Danville when the approach of the boat was signalled, and he started by the plank-walk for the wharf. It was then after midnight and he took a lighted lantern to guide him. The light was extinguished by the wind before he reached the shed, and he was obliged to enter that building in the dark. He knew nothing of the hatches in the floor, and into one of these he fell, sustaining severe injuries. *Held,* that the company was liable, the place being one into which it had invited Bennett to come on business in which the company was profitably interested.

HARLAN, J.: The facts disclosed by the pleadings, and by the demurrer conceded to exist, seem to bring this case within the rule—founded in justice and necessity, and illustrated in many adjudged cases in the American courts—that the owner or occupant of land who, by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation. Railroad Company vs. Hanning, 15 Wall. 649; Carleton and Others vs. Franconia Iron and Steel Co, 99 Mass. 216; Sweeny vs. Old Colony and Newport Railroad Co., 10 Allen (Mass.), 368; Wharton, Negligence, sects. 349-352; Cooley, Torts, 604-607, and authorities cited by those authors. The last-named author says that when one "expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise

ordinary care and prudence to render the premises reasonably safe for the visit." * * *

Another case, often cited, is Chapman vs. Rothwell, 1 El., B. & E. 168. The declaration there charged that the defendant was in possession and occupation of a brewery, office, and passage leading thereto from the public street, used by him for the reception of customers and others in his trade and business as a brewer. The passage was the usual and ordinary means of ingress and egress to and from the office, from and to the public street. The defendant negligently permitted a trap-door in the floor of that passage to be and remain open, without being properly guarded and lighted. The plaintiff's wife had been to the brewery office as a customer in the defendant's business, and was walking along the passage on her return to the public street, when she fell through the trap-door and was injured and killed. Upon the argument, counsel for defendant insisted that no facts appeared showing it to be the duty of the defendant to keep the trap-door closed. To this ERLE, J., replied, with the sanction of LORD CAMPBELL, C. J.: "If you invite a customer to come to your shop, and leave a pitfall open, or a large iron peg in the part of the floor over which the customer is likely to tread, is not that a duty and a breach, if accident ensues?" The court there drew a distinction between the case of a mere visitor, as in Southcote vs. Stanley (1 H. & N. 247), and a customer, who, as one of the public, is invited for the purposes of business carried on by the owner or occupier of the premises.

In Indermaur vs. Dames (Law Rep. 1 C. P. 274, and 2 id. 313), the court, referring to the class of persons who visit premises upon business which concerns the occupier, and upon his invitation, express or implied, said that it was settled law that a visitor of that class, "using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact." * * *

We entertain no doubt that upon the case, as made by the pleadings, the railroad company is liable in damages. As the deceased did not purchase from the railroad company a through ticket, but only a ticket, over its line, from Vernon to Danville station, it may be argued that the relation of carrier and passenger, which existed between the company and him, terminated when he left the train at Danville station, and, consequently, that there was no breach of the company's contract of transportation. But there was, nevertheless, a breach of legal duty or obligation for which, as property owner, the railroad company is responsible

It cannot be pretended that Bennett, at the time he was injured, was, in any sense, a trespasser upon the premises of the company. Nor is this case like many, cited in the books, of mere passive acquiescence by the owner in the use of his premises by others. Nor is it a case of mere

license or permission by the owner, without circumstances showing an invitation extended, or an inducement, or, in the language of some of the cases, an allurement, held out to him as one of the general public. It is sometimes difficult to determine whether the circumstances make a case of invitation, in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. "The principle," says Mr. Campbell, in his treatise on Negligence, "appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it."

As each case must largely depend upon its special circumstances, we shall not attempt to lay down a general rule upon the subject. It is quite sufficient to say that no difficulty of discrimination exists in the case before us. This is the case of a traveller, going upon a way which had been constructed and was maintained by a railroad company, in part for its own benefit and profit, to be used by all, without distinction, who desired, for purposes of business, to pass to and from the company's wharf-boat, moored at an established landing upon a public navigable river. The deceased, when injured, was using the premises for some of the very purposes for which they had been appropriated, and to which they had been, in a sense, dedicated by the owner. They were so situated, with reference to the river, and were so occupied and controlled by the company as not only to invite their use by the public, but practically to compel those having business at the river landing to abandon such business, or, in its prosecution, to pass over the route through the shed-depot. It was, therefore, the plain duty of the company to take such precautions, from time to time, as ordinary care and prudence would suggest to be necessary for the safety of those who had occasion to use the premises for the purposes for which they had been appropriated by the company, and for which, with its knowledge and permission, it was commonly used by the public.

Smith vs. Marrable, 11 M. & W. 5. Exchequer (1843).

This case is thus stated by MR. SHIRLEY in his collection of leading cases:

"5 Brunswick Place, Sept. 19, 1842.

"Lady Marrable informs Mrs. Smith that it is her determination to leave the house in Brunswick Place as soon as she can take another, paying a week's rent, as all the bedrooms occupied but one are so infested with bugs that it is impossible to remain."

And in pursuance of this determination the Marrables moved out, and Smith went to law with them, alleging that, as they had taken the house for five weeks, they had no business to leave in this summary fashion, bugs or no bugs. The Marrables, on the other hand, successfully contended that it is an implied condition in the letting of a furnished house that it shall be reasonably fit for habitation, and that, if it is not fit, the tenant may quit without notice.

Fisher vs. Lightall, 4 Mackey, 82. District of Columbia (1885).

This was a suit to recover monthly installments of rent for a house and furniture under a written lease.

The defendant leased a house from the plaintiff, but at the end of three months vacated the premises, giving as his reasons that the plumbing was so defective as to permit sewer gas to invade the house, and to make proper drainage impossible, that the heating apparatus was inadequate and out of order, and that the place was infested from basement to garret with ants, all of which caused illness in his family and rendered the house unfit for human habitation.

The defendant's position was that, in the renting of a furnished house, there is an implied condition that it is fit for habitation, for which reliance was had upon Smith vs. Marrable, 11 M. & W. 5.

The court observed that the doctrine of Smith vs. Marrable had been, in Sutton vs. Temple and Hart vs. Windsor, limited to the case of furnished apartments, and that the later case of Wilson vs. Finch-Hatton, L. R. 2 Ex. Div. 336, was the case of a furnished house let for immediate occupation, and which proved to be so distinctly dangerous to health, by reason of defective drainage, that the lessee was held not bound to take it or to pay rent. In the present case it was held that the lessee was bound by the terms of the lease and was liable for the stipulated rent, notwithstanding that the letting was of a furnished house and the house was uninhabitable.

Hart vs. Windsor, 12 M. & W. 68. Exchequer (1843).

The plaintiff brought an action in debt, his declaration stating that he had demised to the defendant a certain dwelling house and garden for a term of three years, the defendant agreeing to pay therefor an annual rent of £50, payable quarterly; and that the defendant had entered upon the demised premises and occupied the same for three months, but had paid no rent; wherefore the plaintiff sued for the first quarter's rent.

The defendant's plea, upon which the decision turned, admitted the making of the lease and the entry of the defendant upon the premises, but alleged by way of avoidance that the house was let to him as a dwelling and for the purpose of his inhabiting the same; that at the time of the letting and of his entry the premises were "not in a reasonable, fit and proper state or condition for habitation or dwelling therein," nor were they so whilst he remained in possession thereof; that "he

could not reasonably inhabit or dwell therein, or have any beneficial use or occupation of the same, for and by reason of the same being greatly infested, swarmed and overrun with noxious, stinking and nasty insects, called bugs," of which condition the defendant had no knowledge at the time of making the lease; that having entered upon the premises and discovered that they were, for the reason stated, uninhabitable, he had, shortly thereafter and before the end of the first quarter, quitted, vacated and abandoned the possession, and given notice of his abandonment to the plaintiff; and that he had not since occupied the premises or had any beneficial use thereof.

The plaintiff replied *de injuria sua absque tali causa.* On these pleadings the cause was tried, the defendant proved the facts alleged in his plea, and the verdict was in his favor. The plaintiff now moved for judgment *non obstante veredicto* on the record, contending that the plea sufficiently confessed the letting of the premises and the defendant's obligation to pay the agreed rent, and that the facts set up in the plea to avoid this obligation were insufficient for that purpose. The question, therefore, was, whether the uninhabitable state of the premises discharged the defendant from his contract to pay rent. The court was of opinion that the defendant was, notwithstanding the vermin, bound to pay for the premises, and judgment was accordingly entered for the plaintiff notwithstanding the verdict, which established what was held to be an immaterial fact.

PARKE, B.: The point to be considered, then, is, whether the law implies any contract as to the condition of the property demised, where there is a lease of a certain ascertained subject, being real property, and that lease is made for a particular object.

The question relates to a case of an actual demise of a specific tenement; and we have not to inquire what the obligations of a party would be under an executory agreement to procure a lease of *some* house for the habitation of another; nor whether the defendant would not be exonerated on the ground of fraud in the plaintiff, if the plaintiff knew of the defect in the house himself, and that the defendant would not have taken the house if he knew it; nor have we to consider whether the defendant would be responsible if, at the time of the demise there was no house at all. * * * The simple question is, what is the implied obligation on the part of the landlord to his tenant under a lease of a house for years.

Considering this case without reference to the modern authorities, which are said to be at variance, it is clear that, from the word *demise*, in a lease under seal, the law implies a covenant, in a lease not under seal a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word *let*, or any equivalent words (Shep. Touchstone, 272), which constitute a lease, have, no doubt, the same effect, but no more. Shep. Touch. 165, 167. There is no authority for saying that these words imply a contract for any particular state of the property at the time of the demise; and there are many which clearly show that there is no implied contract that the property shall *continue* fit for the purpose for which it is demised; as the tenant can neither maintain an action, nor is he exonerated from the payment of rent, if the house demised is blown down or destroyed by fire: Monk vs. Cooper, 2 Strange, 763; Balfour vs. Weston, 1 T. R. 310; and Ainsley vs. Rutter, there cited; or gained upon by the sea, Taverner's Case, Dyer, 56, a; or the occupation rendered impracticable by the King's enemies, Paradine vs. Jane, Alleyn, 26; or where a wharf demised was swept away by the Thames, Carter vs. Cummins, cited in 1 Chancery Cases, 84. In all these cases the estate of the lessor continues, and that is all the lessor impliedly warrants.

It appears, therefore, to us to be clear, upon the old authorities, that there is no implied warranty on a lease of a house, or of land, that it is, or shall be, reasonably fit for habitation or cultivation. The implied contract relates only to the estate, not to the condition of the property.

But the defendant's counsel rely upon some modern decisions in support of the positions which they are to maintain. It is not necessary to refer to the cases on the implied warranty of chattels, further than to say that the rule of the common law which prevails in general (Co. Litt. 102, a), that there is no implied warranty on the sale of specific goods, has had exceptions engrafted upon it, where the goods are ordered from a manufacturer or tradesman, who impliedly engages to use a proper degree of skill and care in constructing or supplying them. Such are the cases of Brown vs. Edgington, 2 M. & G. 279; 2 Scott, N. R. 496; Shepherd vs. Pybus, 3 M. & G. 68; 4 Scott, N. R. 434; and others. These have no bearing upon the present case.

But the defendant chiefly rests his case upon the decision of Smith vs. Marrable, 11 M. & W. 5. My judgment in that case certainly proceeded upon the authority of two previous decisions, which, though they contained a novel doctrine, had not been questioned in Westminster Hall, and had received, to a certain degree, the sanction of the Lord Chief Justice Tindal in a subsequent case. Those cases were Edwards vs. Etherington, before Lord Tenterden, and afterwards the Court of King's Bench, Ry. & M. 112, and 7 D. & R. 117; and Collins vs. Barrow, 1 M. & Rob. 112; and the last, that before Lord Chief Justice Tindal, was Salisbury vs. Marshall, 4 C. & P. 65; and I thought they established the doctrine, not merely that there was an implied contract on the part of the lessor, that the house demised should be habi-

table, for an implied condition, that the lease should be void if it were not, and the tenant chose to quit. From the full discussion which those cases have now undergone, on the present argument, and that in the recent case of Sutton vs. Temple, I feel satisfied they cannot be supported, if the reports of them are correct; and we all concur in opinion that they are not law—an opinion strongly intimated in the case of Sutton vs. Temple, in which this court decided that there was no implied warranty of condition or fitness for a particular purpose on a lease of aftermath.

We are under no necessity of deciding in the present case whether that of Smith vs. Marrable be law or not. It is distinguishable from the present case on the ground on which it was put by Lord Abinger, both on the argument of the case itself, but more fully on that of Sutton vs. Temple; for it was the case of the demise of a ready-furnished house for temporary residence at a watering-place. It was not a lease of real estate merely. But that case certainly cannot be supported on the ground on which I rested my judgment.

We are all of opinion, for these reasons, that there is no contract, still less a condition, implied by law on the demise of real property only, that it is fit for the purpose for which it is let. The principles of the common law do not warrant such a position; and though, in the case of a dwelling house, taken for habitation, there is no apparent injustice in inferring a contract of this nature, the same rule must apply to land taken for other purposes—for building upon, or for cultivation; and there would be no limit to the inconvenience which would ensue. It is much better to leave the parties in every case to protect their interests themselves, by proper stipulations; and if they really mean a lease to be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning.

Howell vs. Schneider, 24 App. D. C. 532.

Mr. Howell rented a dwelling house owned by the defendants. Before the lease was executed, Howell obtained from the agents of the defendants a promise that certain repairs should be made to the premises, the repairs being for the most part in the way of painting and papering the house, there being no stipulation with respect to the plumbing in the bath-room, in the condition of which the prospective lessee found nothing defective. The promised repairs were made, and Howell went into possession of the premises. A few days afterwards, as Mrs. Howell was cleaning the bath-room, the flush-tank suddenly became loose and fell upon her; and for the injuries thereby sustained she brought this action against the owners of the house. At the trial it appeared that the original installa-

tion of the flush-tank had been defective, but it did not appear that either the owners or their agents had any knowledge of that fact or could have discovered it by ordinarily diligent examination.

Held, that the defendants were not liable for the consequences of the accident.

SHEPARD, C. J.: 1. There is no covenant in the contract of lease which the lessees accepted in this case, and the law is well settled that there is no implied warranty in the letting of a house that it is safe and fit for occupation. * * * In the absence of an express warranty the rule of *caveat emptor* applies, and it is for the lessee to make the examination necessary to determine whether the premises are in safe condition and adapted to the purposes of his occupation.

2. Passing by the question whether the parol evidence of the plaintiffs tending to show a promise to make repairs is admissible, in view of the fact that they subsequently accepted the written lease without objection, we are of the opinion that it does not furnish ground for the action. After an inspection of the premises the plaintiffs indicated certain repairs and improvements that were needed or desired, and these were made to their satisfaction. These had no relation to the water box or other closet fixtures. To give this promise and performance the effect of a special warranty covering, not only the improvements pointed out, demanded, and made, but also the complete safety of the premises in other respects, and their fitness for the general uses of occupancy, would be unreasonable, and the settled principles of the law of landlord and tenant will not warrant it. As the injury did not result from any of the improvements made, it is unnecessary to consider what would be the liability of the defendants for the unskillfulness of their contractors, had they undertaken to reconstruct or repair the closet fixtures, either at the request of the plaintiffs or of their own motion.

3. There is an apparent exception to the general rule before stated that seems well established also. Independent of the ordinary legal relations of landlord and tenant, the former owes a duty to the latter that is imposed by a general principle of the common law. He must neither misrepresent the condition of the premises, nor conceal from the tenant knowledge of defects attended with danger to the occupants. Where he has knowledge of such defects which are not open to the observation of his lessee, it is his duty to reveal them in order that the latter may be able to guard against injury from them. While the failure to reveal such conditions may not constitute actual fraud or misrepresentation, it may, in a particular case, amount to such culpable negligence of duty as to afford ground for an action against the lessor in case the lessee sustains injury therefrom. The principle referred to, which has been applied to the ordinary letting of premises, as in this case, is "that one who delivers an article which he knows to be dangerous to another ignorant of its qualities, without notice of its nature

or qualities, is liable for any injury reasonably likely to result, and which does result." * * * Clearly plaintiff's case does not fall within this exception, because there is nothing in the evidence tending to show that the defendants had actual knowledge of the unskillful construction, or dangerous condition, of the water box, or made any misrepresentation in respect of it.

4. The appellant's contention goes farther than this, and asserts the liability of the lessor in those cases, also, where he might have obtained knowledge of the dangerous defect by the exercise of ordinary diligence in the inspection of the premises. We cannot accept this as a sound principle of law applicable to the relations of the parties in this case. It is, in our opinion, contrary to the views expressed by the Supreme Court of the United States in the case before cited, Doyle vs. Union Pacific Railway Company, 147 U. S. 413. * * *

The governing principle of that decision and of those cited with approval in the opinion of the court is, that no action lies by a tenant against a landlord on account of the condition of the premises in the absence of an express warranty or of active deceit. The mere fact that a careful inspection of the premises would have disclosed the defect is not sufficient. The tenant is charged with that duty in his own behalf. * * *

The evidence in this case furnishes no ground for the application of that principle. The water box or flush tank had been substituted for one of older and different construction some two years before, at the request of a former tenant, and had been used with safety by him and the members of his household. The unskillful manner of its attachment to the plugs in the wall was concealed from view, and nothing had called the landlord's attention to it. It is true that it had become slightly detached from the wall, but this condition was not known to the landlord. It was the duty of the tenants, as we have before seen, to make an examination of the premises to determine whether they were in a safe condition and fit for their occupation. The defective construction of the water box was equally open to their observation as that of the landlord. There was nothing more to charge him with actual knowledge than to charge them. They not only failed to discover the defect upon their inspection, but the members of a large family used the closet constantly for more than a week without its discovery.

We are of the opinion that the court did not err in directing a verdict for the defendants.

O'Hanlon vs. Grubb, 38 App. D. C. 251.

Grubb rented a suite of rooms in an apartment house, which was equipped with a central heating plant under control of and operated by the landlord. One of the steam radiators developed a slight crack which caused it to leak, and the janitor was repeatedly notified to have the break repaired. Plaintiff put a small pan beneath the radiator to catch the drip, and matters stood thus when the tenants of the apartment left the city for a short visit during the winter time. During their absence

the leak greatly enlarged and the escaping steam ruined the furniture of the plaintiff. It was contended that no negligence had been shown on the part of the defendant, but that contributory negligence had, as a matter of law, been shown on the part of the plaintiff. Motion to direct a verdict for the defendant was overruled, and the appeal followed a verdict in favor of Grubb. *Held*, that the case was properly submitted to the jury.

ROBB, J.: The pivotal question in this case is whether there existed any liability on the part of the landlord to repair the defective radiator. As was said in Iowa Apartment House vs. Herschel, 36 D. C. Appeals, 457, we "are not dealing with an ordinary tenancy. The tenancy here relates to an apartment house,—a class of tenancy of comparatively recent origin, and one which in some respects at least, is to be distinguished from other classes." * * *

The obligation to furnish steam heat carried with it the duty of providing and maintaining means for the proper fulfillment of that obligation. The implied covenant to keep this heating system in repair carries with it the right on the part of the landlord to enter the premises at reasonable times for the purpose of fulfilling that obligation. Such a control of the premises on the part of the landlord is not inconsistent with the possession of the tenant as the owner of the particular estate during the tenancy. Miles vs. Janvrin, 200 Mass. 514, 86 N. E. 785.

It is next contended that the plaintiff was guilty of contributory negligence as matter of law. In the first place, the plaintiff was not a steam fitter; and, in the second place, there is no evidence in the record that anyone not possessing some knowledge of such matters would have had reason to anticipate the sudden enlargement of the defect in the radiator. The plaintiff himself testified that he saw no crack until after the radiator was taken out, and did not, until that time, know the nature of the defect. He repeatedly directed the attention of the defendan's agent to the leaky condition of the radiator, and they promised to have it repaired. Defendant's janitor, who was in charge of the entire heating system, and presumably much more familiar with radiators and their defects than the plaintiff, did not even suggest the imminence of a greater break or the necessity completely to turn off the steam. For a whole month the precautionary measures taken by the plaintiff had been sufficient. He was to be away for two days only. While the evidence shows that the janitor had no key to the apartment, it does not show that the agent did not have one. It does not even appear that the plaintiff knew that the janitor was without a pass-key; but, aside from that, we do not think the conduct of the plaintiff, in the circumstances, was such that reasonable men would be bound to say he was negligent. The question was carefully submitted to the jury under a prayer prepared by the defendant. This was all the defendant could ask. * * *

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